1992

Brooks v. Brooks : Brief of Appellant

Utah Court of Appeals

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Docket No. 920733 UTAH COURT OF APPEALS

JO ANN BROOKS (NUNLEY),	:	Case No. 920733-CA
Plaintiff, Appellee, and Cross-Appellant,	:	District Court No. 880904192
	:	Priority No. 15
v.	:	
THOMAS M. BROOKS,	:	
Defendant, Appellant, and Cross-Appellee.	:	

BRIEF OF APPELLANT AND CROSS-APPELLEE THOMAS M. BROOKS

APPEAL FROM ORDER MODIFYING DECREE OF DIVORCE ENTERED ON OCTOBER 2, 1992 IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, BY THE HONORABLE RICHARD H. MOFFAT.

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JURISDICTION

This is an appeal from an Order Modifying Decree of Divorce entered in the Third Judicial District Court, Salt Lake County, State of Utah on October 2, 1992. The Utah Court of Appeals has jurisdiction of this appeal pursuant to Rules 3 and 4 of the Utah Rules of Appellate Procedure and Utah Code Ann. § 78-2a-3 (2)(h) (1992).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the court abused its discretion in ordering Mr. Brooks to pay one-half of the minor child's prospective private school expenses and in entering judgment against Mr. Brooks for one-half of all private school expenses incurred on behalf of the minor child from and after the date of the filing of the Amended Petition to Modify Decree of Divorce.

2. Whether the court abused its discretion in finding that Mr. Brooks has a financial ability to assist Mrs. Nunley in paying private school expenses for and on behalf of the minor child in addition to paying his regular child support payments.

3. Whether or not the court erred, as a matter of law, in determining that it did not have the authority to apply the Social Security benefits received by Mrs. Nunley on behalf of the minor child by reason of Mr. Brooks' permanent disability toward satisfaction of his past and ongoing obligation to pay one-half of Michelle's private school expenses.

4. Whether the court abused its discretion in considering evidence submitted by Mrs. Nunley relating to amounts incurred by her for the medical and dental expenses and private school expenses

for the parties' minor child after trial without allowing Mr. Brooks opportunity for hearing and cross-examination.

DETERMINATIVE STATUTORY AUTHORITY

Utah Code Ann. § 78-45-7. **Determination of amount of support - Rebuttable guidelines.**

> (1) Prospective support shall be equal to the amount granted by prior court order unless there has been a material change of circumstance on the part of the obligor or obligee.
>
> . . .
>
> (3) If the court finds sufficient evidence to rebut the guidelines, the court shall establish support after considering all relevant factors, including but not limited to:
>
> (a) the standard of living and situation of the parties;
> (b) the relative wealth and income of the parties;
> (c) the ability of the obligor to earn;
> (d) the ability of the obligee to earn;
> (e) the needs of the obligee, the obligor, and the child;
> (f) the ages of the parties; and
> (g) the responsibilities of the obligor and the obligee for the support of others.

Utah Code Ann. § 78-45-7.5 **Determination of gross income - Imputed income.**

> . . .
>
> (8) (b) Social Security benefits received by a child due to the earnings of a parent may be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case.

STATEMENT OF THE CASE

The parties were granted a divorce by the Superior Court of California, County of Los Angeles, in approximately August of 1985. The California Decree of Divorce provided that the parties were

awarded joint legal and physical custody of their minor child, Michelle, with the plaintiff to have primary physical custody. The court ordered Mr. Brooks to pay Mrs. Nunley child support in the amount of $300 per month and ordered Mrs. Nunley to pay $100 per month to Mr. Brooks during any month in which the minor child resided with Mr. Brooks for sixteen or more days. In addition, Mrs. Nunley was ordered to pay the costs of transporting the minor child to and from her visitation with Mr. Brooks.

Originally, in June of 1988, the plaintiff brought a Petition for Modification of Foreign Divorce Decree on the sole issue of which party was to bear the expense of the transportation of the minor child from Utah, where Mrs. Nunley resided, to Montana where Mr. Brooks had moved. Mr. Brooks filed a counter-motion for modification seeking to enforce his rights of visitation and for a judgment against the plaintiff for unpaid transportation costs under the California Decree. In approximately November of 1988, Mrs. Nunley filed an Amended Petition for Modification of Foreign Divorce Decree, and, in addition to the foregoing, she requested increased child support and an order requiring the defendant to pay for one-half of Michelle's medical expenses, including insurance premiums, and one-half of all of Michelle's private school tuition, costs and expenses.

The case went to trial on April 22, 1991, and the court entered its Minute Entry on or about April 26, 1991, wherein, among other things, Mr. Brooks was ordered to pay one-half of the private school expenses of the minor child and the court ordered that

judgment be entered against him for any arrearages for such expenses. The court also ruled that Mr. Brooks was entitled to a credit towards his obligation to pay private school expenses for Social Security benefits paid to the minor child as a result of Mr. Brooks' disability.

Thereafter, Mrs. Nunley filed a Motion for Clarification of Ruling and for In-Camera Interview to which Mr. Brooks objected. There followed a series of post-trial motions by both parties which are more particularly described below. These motions included submission by Mrs. Nunley of financial information relating to amounts she had incurred for the minor child's medical expenses and private school expenses which she had not introduced at trial, and Mr. Brooks' objection thereto on the basis that either the evidence was barred by her failure to introduce it at trial, or he was entitled to a hearing on the new information at which he could cross-examine Mrs. Nunley and raise objections relating to the evidence.

In the course of considering the post-trial motions of the parties and the objections thereto, Judge Moffat changed the ruling made in his Minute Entry of April, 1991 so that the final Order Modifying Decree of Divorce does not allow Mr. Brooks to apply amounts received by the minor child as a result of his permanent disability to his obligation to pay one-half of her private school expenses. Mr. Brooks argued that without applying those payments, he was financially unable to pay a portion of private school expenses.

Over all of Mr. Brooks' objections, the Order Modifying Decree of Divorce was entered by the court on October 2, 1992 wherein Mr. Brooks is required to pay one-half of the minor child's private school expenses without any credit for the child's Social Security benefits and wherein judgment was entered against him in the amount of $11,792.06 for arrearages in medical, dental and private school expenses. There were no post-judgment motions filed, and Mr. Brooks filed his Notice of Appeal on Monday, November 2, 1992. Mrs. Brooks filed her Notice of Cross-Appeal on November 13, 1992.

STATEMENT OF FACTS

1. The parties were divorced pursuant to a Decree of Divorce entered in the Superior Court of the State of California, County of Los Angeles, on or about August 14, 1985. The parties were awarded joint legal and physical custody of the parties' minor child, Michelle Nohealani Brooks, born September 18, 1980. (See plaintiff's Exhibit 6 and Trial transcript p. 4.) Mr. Brooks was ordered to pay Mrs. Nunley child support in the amount of $300 per month. If the minor child resided with Mr. Brooks for sixteen or more days in any month, Mrs. Nunley was ordered to pay Mr. Brooks child support in the amount of $100 for that month. (See plaintiff's Exhibit 6) Mrs. Nunley was ordered to pay the transportation expenses associated with Mr. Brooks' visitation. (Plaintiff's Exhibit 6 and Trial transcript p. 5) Immediately thereafter, Mrs. Nunley moved to Salt Lake City, Utah, and some time later Mr. Brooks moved to Montana. (R. 3-15)

2. On or about June 27, 1988, Mrs. Nunley filed her Petition for Modification of Foreign Decree, wherein she requested an order of court modifying the California Decree as it related to her obligation to pay transportation costs associated with the minor child's traveling from Salt Lake City to Los Angeles for visitation with Mr. Brooks. (R. 2-9) At the time of entry of the Decree of Divorce, Mrs. Nunley received free and/or discounted air travel through her employment with TWA. (R. 4) She alleged that since there were no TWA flights between Salt Lake City and Montana and therefore no flight benefits, there had been a substantial change of circumstances upon which the court should modify the Decree of Divorce. (R. 5)

3. Mr. Brooks brought a counter-petition for modification denying that Mrs. Nunley was entitled to the relief requested and seeking an order requiring Mrs. Nunley to comply with the visitation provisions of the Decree and her obligation to pay the travel expenses associated with that visitation. (R. 15-20)

4. Pursuant to stipulation of the parties, (R. 44) the plaintiff amended her Petition to Modify Foreign Decree on or about November 23, 1988. To the previous claim for relief, Mrs. Nunley sought a court order requiring Mr. Brooks to pay for one-half of Michelle's medical and dental expenses, one-half of private school tuition, costs, and expenses and seeking a court order increasing Mr. Brooks' child support of $300 per month under the California Decree to an amount commensurate with the applicable child support guidelines. (R. 34-43)

5. The case came on for trial on April 22, 1991. (R. 218)

6. At the time the parties were divorced, Mr. Brooks was employed by the Los Angeles Police Department. As of June, 1985, Mr. Brooks was honorably and medically retired from the police department. (Trial transcript p. 84) At the time of trial, Mr. Brooks had a disease of the thyroid, an ulcer disease and a heart disease. (Trial transcript p. 87) In January of 1991, Mr. Brooks had a heart attack, (Trial transcript p. 88) and he suffered from post-traumatic stress syndrome resulting, at least in part, from two work-related helicopter crashes. (Trial transcript pp. 89-91) At the time of trial, Mr. Brooks was on numerous medications including nitroglycerin, Cortisone, Sinequan, Zanex, Halcion, Codeine and Fiovinal (Trial transcript p. 92).

7. Mr. Brooks testified that the heart problem restricted his ability to work (Trial transcript p. 90), and his income consisted of $2,332.26 per month from the Los Angeles City Pension Plan and $697.00 per month in Social Security disability benefits. (See defendant's Exhibit 6.)

8. Mrs. Nunley attempted to establish that Mr. Brooks' income was in excess of the $3,029.26 outlined above based upon, in part, his ownership of a Ferrari automobile purchased in 1986 and the significant deposits to his checking account from May 16 of 1988 to July 17 of 1990 in the amount of $173,650.68. However, all of these monies were accounted for by Mr. Brooks as follows:

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REBUTTAL OF ALLEGED DEFENDANT'S INCOME

Deposits to checking account (5/16/88 - 7/17/90)	$173,650.68
Less proceeds from defendant's sale of home in Los Angeles	- 43,649.91
Less proceeds from defendant's second mortgage loan from Ronnie Hansen	- 15,000.00
Less credit card advances (5/16/88 - 7/17/90)	- 17,687.59
Less loans from defendant's family	
Brother	- 2,025.50
Father	- 23,000.00
Adjusted Balance (5/16/88 - 7/17/90)	$ 72,287.68
Less Pension Income	
5/88 to 7/88 - 1,916.88 x 3	- 5,750.64
8/88 to 7/89 - 1,992.77 x 12	- 23,913.24
8/89 to 7/90 - 2,077.23 x 12	- 24,926.76
	$ 17,697.04
Less Pension adjustment check	
Insurance payment	- 4,000.00
Security wages	- 3,462.00
Tax refunds	- 789.00
Trout (food reimbursement)	- 750.00
Insurance medicine (reimbursement)	- 1,051.00
	$ 7,646.04
Less 6/15/90 Pension adjustment check	- 5,346.23
	$ 2,299.81

(See Defendant's Exhibit 11)

9. Mrs. Nunley had voluntarily terminated her employment with Delta Airlines in June of 1989, (Trial transcript pp. 13 and 13-21) and at the time of trial, she was self-employed designing, manufacturing, and distributing costumes as Nunley, Inc. (Trial transcript p. 15)

10. Mrs. Nunley testified that she took no salary from the business from 1989 through 1991 except $2,000 in 1989 and that all monies received were reimbursement for expenses incurred. (Trial transcript p. 16) She was willing to stipulate that, for purposes of calculating child support, her income was $800 per month. (Trial transcript p. 17)

11. The tax return filed by Nunley, Inc. in 1990 showed gross receipts in the amount of $221,120.00 and a net profit of $4,493.00 on which the corporation was taxed. (Defendant's Exhibit 12 and Trial transcript p. 63)

12. At the time of trial, Mrs. Nunley was receiving child support in the amount of $300 per month. In addition, Mrs. Nunley was receiving Social Security disability payments for and on behalf of the parties' minor child as a result of Mr. Brooks' disability. She had received a lump sum payment of $6,000 and was receiving $345.00 per month. (Trial transcript pp. 55-56) Mrs. Nunley testified that she was not spending this money because she was concerned that Social Security would recall it if they found out Mr. Brooks was not really disabled. (Trial transcript pp. 60-62) Mrs. Nunley admitted she had no evidence to support her concern, and that it was just a suspicion. (Trial transcript p. 62)

13. Mrs. Nunley and her second husband had historically earned the following amounts: (See Defendant's Exhibit 3)

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SUMMARY OF PLAINTIFF'S YEARLY INCOME - JOINT TAX RETURNS

YEAR	SOURCE	TOTAL
1986 Joint Tax Return	Husband - W-2	$53,272.00
	Wife - W-2	$23,038.00
	Interest	$ 1,693.00
	Dividends	$ 652.00
	Refunds	$ 1,919.00
		$80,574.00
1987 Tax Return	Husband - W-2	$63,259.05
	Wife - W-2	$38,499.95
	Interest	$ 1,552.00
	Refunds	$ 1,272.00
		$94,483.00
1988 Tax Return	Husband - W-2	$63,239.45
	Wife - W-2	$26,020.55
	Dividends	$ 1,029.00
	Refunds	$ 532.00
		$90,821.00
1989 Tax Return	Husband - W-2	$74,797.00
	Wife - W-2	$11,299.00
	Interest	$ 399.00
	Dividends	$ 1,101.00
	Refund	$ 1,649.00
		$89,245.00

14. During their marriage, the parties sent Michelle to a private school in California called Westchester Lutheran School when she was three and four years old. (Trial Transcript p. 22) Several weeks after the parties were divorced in August, 1985, Mrs. Nunley remarried and moved to Salt Lake City where she enrolled Michelle at Rowland Hall-St. Mark's private school. (Trial transcript p. 104)

15. Mrs. Nunley unilaterally made the decision to send Michelle to private school in Utah without discussing it with Mr. Brooks. (Trial transcript pp. 42-43 and 105-105) At no time did Mrs. Nunley request Mr. Brooks pay for half of the expenses associated therewith until her filing of the Amended Petition to Modify in or about November, 1988. (Trial transcript p. 103-105)

16. Without credit for the disability payments being received by Michelle, Mr. Brooks asserted he was financially unable to pay a portion of Michelle's private school expenses. (Transcript of March 9, 1992 hearing pp. 5-9 and R. 780-786)

17. After trial, the court entered its Minute Entry on or about April 26, 1992 wherein, among other things, the court ruled as follows:

a. While expressing concern that neither party fully disclosed their income, the court found that Mrs. Nunley's current monthly income was $900.00 per month and Mr. Brooks' monthly income was $3,029.00 per month. The court denied Mrs. Nunley's request for increased child support, finding that the $300 required under the California Decree was in excess of the

$252 per month provided for pursuant to the Utah Child Support Guidelines.

b. The court ordered that the parties share equally in the cost of transportation of the minor child for visitation, and ordered Mrs. Nunley to reimburse Mr. Brooks for one-half of his transportation costs reasonably incurred in exercising his visitation rights.

c. The court ordered each party to pay one-half of the private school tuition, books and supplies, school activities and school uniforms of the minor child. The court found that this obligation should not extend to the child's extracurricular activities. The court ruled that the amount being paid to Mrs. Nunley on behalf of the minor child by Social Security as a result of Mr. Brooks' permanent disability should be applied against his obligation to pay private school expenses. The court ordered that judgment be entered against the defendant in an amount to reimburse the plaintiff for private school costs incurred after giving Mr. Brooks this credit.

f. Each party was ordered to pay their own attorney's fees incurred in maintaining this action. (R. 221-227)

18. Thereafter, on or about June 6, 1991, Mrs. Nunley brought a Motion for Clarification of Ruling and for In-Camera Interview. In this motion, Mrs. Nunley alleged that the proposed Findings of Fact and Conclusions of Law prepared by Mr. Brooks' counsel did not conform with the court's Minute Entry. In addition, although listing no details, Mrs. Nunley alleged that certain issues needed

to be clarified and that the court should conduct an in-camera interview with the parties' minor child with respect to that summer's visitation because the parties were unable to communicate on the issue between themselves. (R. 292-294)

19. Mr. Brooks objected to Mrs. Nunley's motion, arguing in favor of the proposed findings and conclusions submitted to Mrs. Nunley's counsel and pointing out that her assertions as to issues needing clarification were totally without support or specifics. Finally, Mr. Brooks objected to the in-camera interview on the basis that the issue of summer visitation was not properly before the court. He sought an award of attorney's fees for the necessity of responding to the motion. (R. 302-305)

20. Mrs. Nunley filed a response to the effect that the motion was necessary based upon the "grave differences" in the parties' interpretation of the April 26, 1991 Minute Entry. (R. 306-308)

21. Mrs. Nunley's Motion for Clarification came before the court for oral argument on August 7, 1991. (The transcript of this hearing is located at R. pp. 419-482) After arguing numerous issues, the court decided to allow Mrs. Nunley to submit a motion to amend the court's ruling pursuant to Rule 4-501 of the Utah Code of Judicial Administration on the following issues:

a. Whether or not the court's ruling on application of the minor child's Social Security benefits to defendant's obligation to pay private school costs was appropriate. (R. 459-460)

b. The amounts paid by Mrs. Nunley for tuition, books, activities and uniforms for private school for the minor child for which she was seeking reimbursement. (R. 469-471)

c. The court agreed that in his April 26th Minute Entry the court had failed to address Mrs. Nunley's claim for one-half of medical expenses incurred on behalf of the minor child. The court allowed her to submit additional evidence as to her medical expenses incurred. (R. 474-476)

22. The court specifically allowed counsel for Mr. Brooks sufficient time to respond to plaintiff's motion to allow him to conduct discovery on these issues if necessary. The court granted Mr. Brooks 30 days to respond, but in no event was he required to respond sooner than September 6, 1991. (R. 459-461)

23. Counsel for Mr. Brooks expressly reserved his objection to the submission of additional documentary evidence of expenses incurred by Mrs. Nunley on the basis that such evidence was not timely presented at trial. (R. 477)

24. Finally, at the August 9th hearing, the court ruled that the expenses which each party was ordered to reimburse the other would begin to accrue as of the date of the filing of the amended petition, and not from the date of the Decree of Divorce. (R. 487)

25. When Mrs. Nunley failed to file this motion, to amend in a timely manner, Mr. Brooks filed his Motion to Strike Plaintiff's Reserved Issues from Motion for Clarification, Sanctions and Attorneys Fees on or about September 16, 1991. (R. 376-379 and 388-382). The court denied the motion on or about November 8, 1991.

26. Over the objections of Mr. Brooks, the court entered its written order relating to the August 9th hearing prepared by Mrs. Nunley's attorney on or about December 3, 1991. (R. 737-746)

27. Prior to entry of this order on the rulings made in the August hearing, counsel for Mrs. Nunley submitted her Motion for Post-Trial Determination of Divorce Modification Issues on or about November 1, 1991, almost two months after the time set forth by the court for Mrs. Nunley to file the motion and for Mr. Liapis to respond. (R. 527) Attached as Exhibit "C" to the motion was the Affidavit of JoAnne Nunley to which was attached over one hundred pages of purported documentation supporting her claim for one-half of $47,490.95 in private school expenses. (R. 548-657) Attached as Exhibit "D" to the plaintiff's motion was the Affidavit of JoAnne Nunley relating to her claim for medical and dental expenses. (R. 658) To this affidavit was attached fifty nine pages of documentation to support Mrs. Nunley's claim for one-half of $2,994.00. (R. 658-720)

28. On or about December 6, 1991, Mr. Brooks filed his Memorandum in Opposition to Plaintiff's Motion for Post-Trial Determination of Divorce Modification Issues relating primarily to the court's authority to apply Michelle's Social Security benefits to Mr. Brooks' obligation to pay one-half of her private school expenses. (R. 747-753)

29. On December 16, 1991, Mr. Brooks filed a supplement to his primary memorandum in opposition, (R. 777) and on December 17, 1991, Mr. Brooks filed his Answer to Plaintiff's Motion for Post-

trial Determination and in Support of his Motion for Attorney's Fees. (R. 780) Among the defenses listed in these documents were the following:

a. Pursuant to Utah Code Ann. § 78-45-7.5 (8)(b) (1992) a court is given discretion in deciding whether or not Social Security benefits received by a child due to the earnings of a parent should be credited to that parent's child support obligation. (R. 777)

b. Mr. Brooks argued that Mrs. Nunley's motion for determination of post-trial issues was barred by the fact that she did not submit the evidence at time of trial.

c. Should the court change its decision relating to application of Michelle's Social Security benefits to Mr. Brooks' obligation to pay private school expenses, then Mr. Brooks requested the court receive and evaluate additional evidence and make a finding relating to his financial inability to pay private school expenses without such credit and vacate its order requiring him to do so.

30. The plaintiff made motions to strike the supplement and answer filed by Mr. Brooks (R. 759 and R. 788) which the court granted. (R. 798)

31. The court entered its Minute Entry dated December 19, 1991 wherein it granted Mrs. Nunley's motion for post-trial determination of modification issues without any evidentiary hearing. (R. 796) In so doing, the court vacated its Order of April 26, 1991

allowing the defendant a credit for amounts paid to Michelle as a result of his disability. The court ordered that judgment be entered against the defendant in the amount of $13,360.75 for private school costs and expenses and in the amount of $805.23 for medical and dental expenses. (R. 798)

32. On or about December 31, 1991 Mr. Brooks filed his Motion for Ruling on Omitted Issues, Motion for Evidentiary Hearing and Argument of Court's Minute Entry, Motion for a New Trial and Other Related Matters. This motion was based in large part upon the court's consideration of evidence not submitted at trial without allowing a hearing wherein Mr. Brooks would be allowed to cross-examine Mrs. Nunley on the evidence presented and make objections thereto. Mr. Brooks also pointed out that the court failed to rule on his request to reconsider its order requiring him to pay one-half of private school tuition and expenses in the event the court reversed its ruling allowing Mr. Brooks credit for Social Security benefits received by Michelle towards those expenses. Finally, Mr. Brooks argued that the plethora of documents attached to Mrs. Nunley's affidavits were hearsay and therefore inadmissible. (R. 800-812)

33. Mr. Brooks also filed a Motion to Amend Judgment, and in the Alternative, for Relief from Judgment or Order on or about January 10, 1992, as well as an objection to the plaintiff's proposed order on the motion for post-trial determination (R. 828) and a motion for oral argument. Mrs. Nunley objected to all of the

foregoing, and in its Minute Entry dated January 21, 1992, the court denied all motions without hearing. (R. 850-852)

34. Thereafter, each party prepared proposed Findings of Fact, Conclusions of Law and Order Modifying Decree of Divorce, and each objected to the other's proposed documents. (R. 878) The court heard the argument of the parties relating to the objections on March 9, 1992. (A copy of this transcript is found in the same bound volume as the trial transcript.) The court again heard argument relating to whether or not the court should make a finding relating to Mr. Brooks' ability to pay private school expenses and whether or not he should have been allowed cross-examination on the documents submitted by Mrs. Nunley relating to those expenses (See transcript of March 9th hearing, p. 21.) The parties agreed to sit down and discuss an accounting of amounts due under the court's ruling, and the court agreed to consider whether or not Mr. Brooks was financially able to pay such expenses. (Tr. of March 9th hearing pp. 46-47 and see Court's Minute Entry at R. 911)

35. Mr. Brooks submitted his response to Mrs. Nunley's accounting on May 15, 1992 wherein Mr. Brooks stipulated that certain amounts would be due under the court's ruling. The parties agreed that the amounts assessable against the defendant for private school expenses totaled $10,158.62, and that Mrs. Nunley owed to the defendant the amount of $1,813.25 for one-half of the travel costs incurred by him. Therefore, Mr. Brooks owed to the plaintiff the amount of $8,345.37. (R. 925) In addition to these accounting issues, Mr. Brooks argued in this responsive motion that

his share of private school tuition and expenses for the next school year would total $3,308.73, and that he was unable to afford payment of $300 per month as child support, payment of arrearages in the amount of over $8,000, as well as his share of expenses for the year 1992-1993 in excess of $3,000. (R. 926) Finally, Mr. Brooks set forth the remaining items claimed by Mrs. Nunley to which he objected on the basis that they were either incurred prior to the filing of the amended petition and therefore inappropriate or were items which should be covered from his monthly child support. (R. 927)

36. Mrs. Nunley filed her response and objection on May 20, 1992 which included a claim for amounts paid for Michelle's extracurricular activities in addition to private school expenses and costs. (R. 989-1028)

37. In the court's Minute Entry dated July 22, 1992 the court found that Mr. Brooks owed to Mrs. Nunley the sum of $8,312.75 for private school tuition and costs; the sum of $578.62 as his share of medical, dental and prescription expenses; and the sum of $2,900.69 as additional charges for uniforms, activities and supplies. (R. 1040)

38. Over the objection of the defendant, the court entered its Findings of Fact, Conclusions of Law and Order Modifying Decree of Divorce on October 2, 1992. (A copy of each is attached to this brief as Exhibit A and they are, by reference, made a part hereof) The Order granted Mrs. Nunley judgment in the amount of $11,792.06, and it denied Mr. Brooks credit for the Social Security benefits

received by Michelle. (R. 1051-1075) Mr. Brooks filed his Notice of Appeal on Monday, November 2, 1992. (R. 1099)

SUMMARY OF ARGUMENTS

1. It was an abuse of discretion for the court to modify the Decree of Divorce between these parties to require Mr. Brooks to pay a portion of the minor child's private school expenses without finding that there had been a material and substantial change of circumstances warranting such modification. Instead, the evidence is clear that there was no change of circumstances sufficient to warrant the modification, and this court should vacate the lower court's order.

2. Based upon the overwhelming evidence submitted in this case and based upon the court's finding that Mr. Brooks had a monthly income of $3,029.00, it was an abuse of discretion for the court to find that Mr. Brooks had a financial ability to pay $300.00 per month in child support, over $3000.00 per year in private school expenses, and amounts to satisfy a judgment for arrearages for private school, medical and dental expenses in excess of $11,000.00.

3. The court erred as a matter of law in holding that it did not have the legal authority to apply Social Security benefits received by the minor child as a result of Mr. Brooks' disability to his obligation to pay a portion of her private school expenses. Instead, the court is empowered to do so by statute and pursuant to case law. This court should enter its order allowing Mr. Brooks a credit towards his obligation for amounts received by Michelle

should it determine that the lower court did not abuse its discretion in ordering him to pay a portion of her private school expenses.

4. It was an abuse of discretion for the court to consider documentary evidence submitted by Mrs. Nunley over six months after trial to establish amounts incurred by her from the date of the filing of her petition to modify to the time of trial for the minor child's medical, dental and private school expenses without allowing Mr. Brooks the opportunity for a hearing to cross-examine Mrs. Nunley on this evidence and make objections thereto. This court should remand this case for a hearing on the evidence should it hold that the lower court did not abuse its discretion in ordering Mr. Brooks to pay a portion of Michelle's private school expenses.

ARGUMENTS

I

IT WAS AN ABUSE OF DISCRETION FOR THE COURT TO MODIFY THE DECREE OF DIVORCE TO REQUIRE MR. BROOKS TO PAY ONE-HALF OF THE MINOR CHILD'S PRIVATE SCHOOL EXPENSES, AND TO ENTER JUDGMENT AGAINST HIM FOR ONE-HALF OF SUCH EXPENSES PREVIOUSLY INCURRED

In order to prevail on a petition to modify a decree of divorce, the party seeking the relief must establish that, as a threshold requirement, there has been a material and substantial change in circumstances occurring since entry of the decree of divorce. (See Utah Code Ann. § 78-45-7 (1992) Woodward v.

Woodward, 709 P.2d 393 (Utah 1985); Thompson v. Thompson, 709 P.2d 330 (Utah 1985); and Mineer v. Mineer, 706 P.2d 1060 (Utah 1985).) The provisions of the original Decree of Divorce between these parties which Mrs. Nunley sought to modify related to responsibility for payment of the transportation costs of visitation, the amount of Mr. Brooks' child support obligation, responsibility for ongoing payment of and reimbursement for medical and dental expenses incurred on behalf of the minor child not covered by insurance, and responsibility for ongoing payment of and reimbursement for one-half of all costs and expenses associated with the minor child's private school and extra-curricular activities.

While the court expressly found that there had been a material and substantial change of circumstances relating to modification of the Decree relating to payment of the child's transportation costs, the court also expressly found there had been no substantial and material change of circumstances in the financial condition of the parties to justify an increase in Mr. Brooks' child support obligation. (See Finding of Fact No. 16 at R. 1058-59 and Finding of Fact No. 10 at R. 1056-57) The court made no specific finding whatsoever with respect to whether or not there was a change of circumstances sufficient to warrant a modification requiring Mr. Brooks to pay one-half of Michelle's private school expenses.

To begin with, this failure to make such a finding constitutes reversible error "unless the facts in the record are 'clear, uncontroverted and capable of supporting only a finding in favor of the judgment.'" Haumont v. Haumont, 793 P.2d 421 at 425 (Utah App.

1990) In this case, the facts are capable of supporting only a finding contrary to the court's ruling. Michelle attended private school for at least two years prior to entry of the original Decree of Divorce, and began private school in Utah within weeks thereafter. Therefore, there was no substantial change in Michelle's circumstances. Secondly, the court did find that there was no material or substantial change in the income of the parties to warrant an increase in Mr. Brook's child support obligation. It would clearly follow that there was no change in the financial circumstances of the parties sufficient to warrant a modification requiring him to pay the private school expenses.

As a result, the record is clear that Mrs. Nunley simply could not satisfy the threshold requirement necessary for the court to grant her the relief requested. This court should make such a finding and vacate the lower court's order requiring Mr. Brooks to pay a portion of Michelle's private school expenses. In the alternative, this court should vacate the order and remand the case for specific findings relating to whether or not there has been a substantial and material change of circumstances sufficient to warrant the modification at issue.

Even if there had been a sufficient change of circumstances warranting an order requiring Mr. Brooks to pay private school expenses, the court's finding that he had the financial ability to do so is contrary to the evidence and an abuse of discretion. (See Finding No. 30 at R. 1063) It is clear under the law that a court must consider a parent's financial ability to pay child support and

amounts in excess of a basic child support obligation prior to making such orders. Pursuant to the Utah Uniform Civil Liability for Support Act, Utah Code Ann. § 78-45-1, et seq., an obligor parent's child support obligation is based on the parties' gross monthly income from all but a few enumerated sources. The guidelines are, of course, rebuttable, but in order to avoid their application, a court must make specific findings which relate to the obligor parent's financial circumstances. Pursuant to Utah Code Ann. § 78-45-7(3):

> (3) If the court finds sufficient evidence to rebut the guidelines, the court shall establish support after considering all relevant factors, including but not limited to:
>
> (a) the standard of living and situation of the parties;
> (b) the relative wealth and income of the parties;
> (c) the ability of the obligor to earn;
> (d) the ability of the obligee to earn;
> (e) the needs of the obligee, the obligor, and the child;
> (f) the ages of the parties; and
> (g) the responsibilities of the obligor and the obligee for the support of others.

In addition, although there is no case law on point in the State of Utah, other states which have analyzed whether or not an obligor parent must pay a portion of private school expenses in addition to a base child support amount, have uniformly held that one major factor for the court to consider is the ability of the obligor parent to pay such expenses. For example, in the case of Hardisty v. Hardisty, 439 A.2d 307 (Conn. 1981), the Supreme Court of Connecticut was faced with this issue in a modification proceeding. The Supreme Court of Connecticut held that:

> '[C]ourts have the power to direct one or both parents to pay for private schooling, if the

> circumstances warrant. It is a matter to be determined in the sound discretion of the court on consideration of the totality of the circumstances including the financial ability of the parties, the availability of public schools, the schools attended by the children prior to the divorce, and the special needs and general welfare of the children.'

Id. at 312. (Citing Cleveland v. Cleveland, 161 Conn. 452, 461, 289 A.2d 909 (1971).) (A copy of the Hardisty case is attached to this brief as Exhibit B)

Given the wide discretion vested in trial courts in the State of Utah in fashioning equitable orders in domestic disputes, it would follow that Utah would also adopt a standard wherein the trial court is required to look at all relevant facts and circumstances in determining whether a parent should be compelled to pay for a portion of a child's private school expenses.

Applying the Hardisty factors to the facts of this case, there was absolutely no evidence before the court as to the availability and quality of public schools and any special needs or requirements by Michelle to attend private school. However, as is clear from the record, Mr. Brooks is simply financially unable to do so.

The court appropriately found that Mr. Brooks had a gross monthly income of $3,029.00 from his pension and social security benefits. Mrs. Nunley argued that Mr. Brooks had the ability to earn more and that his purchase of a Ferrari in 1986, his purchase of a home in Montana, and the large deposits to his checking account established he did so. However, the record clearly supports the court's finding. The purchase of the car had been five years prior to trial in this matter, and Mr. Brooks accounted

for all of the deposits to his account as outlined in his Exhibit 11. The deposits consisted primarily of proceeds from the sale of Mr. Brooks' home in Los angeles, loans and his Social Security and pension payments.

Despite Mrs. Nunley's allegations to the contrary, the testimony was essentially uncontroverted that Mr. Brooks suffered from thyroid, ulcer and heart diseases and that he had a heart attack in January of 1991. He testified that, at the time of trial, there was a medical restriction on his becoming actively employed. Mr. Brooks further testified that he was suffering from post-traumatic stress syndrome, resulting at least in part from two helicopter crashes from which he suffered both mental and physical difficulties. At the time of trial, he was on numerous medications including nitroglycerin, Cortisone, Sinequan, Zanex, Halicion and Codeine and Fiorinal. Therefore, he was unable to find private employment to earn in excess of the amounts he received from his pension and in disability benefits although he had earned extra income in the past.

Finally, despite the fact that the parties have joint physical custody of Michelle, Mrs. Nunley's decision to enroll her in private school was a unilateral one. At no time did Mrs. Nunley discuss the issue with Mr. Brooks, and he was allowed no input prior to the decision being made for Michelle. (Trial tr. pp. 42-43) This is contrary to a joint custody arrangement where parents are obliged to exchange information and confer regarding the health, education and welfare of their children. (See Utah Code

Ann. § 30-3-10.3(2)(b)(Supp. 1992).) Further, at no time did Mrs. Nunley request or make demand that Mr. Brooks pay for a portion of Michelle's private school expenses until she filed her Amended Petition for Modification in November, 1988, three years after her decision to enroll Michelle in private school.

Based on all of the foregoing and the court's finding that Mr. Brooks' gross monthly income totalled $3,029.00 per month, it was an abuse of discretion to find that Mr. Brooks had the financial ability to pay $300.00 per month in child support, ongoing private school expenses of over $3,000.00 per year, and arrearages totalling $11,792.06. This court should modify the finding, vacate the court's order requiring Mr. Brooks to pay private school expenses, and vacate the judgment for arrearages entered against him. Instead, this court should enter its order denying Mrs. Nunley's claim that Mr. Brooks should pay a portion of Michelle's private school expenses.

II

THE COURT ERRED AS A MATTER OF LAW IN REFUSING TO ALLOW MR. BROOKS CREDIT TOWARD HIS OBLIGATION TO PAY ONE-HALF OF MICHELLE'S PRIVATE SCHOOL EXPENSES FOR AMOUNTS SHE RECEIVES FROM SOCIAL SECURITY AS A RESULT OF HIS DISABILITY

Throughout this action, Mr. Brooks has taken the position that he is financially unable to pay for a portion of Michelle's private school expenses unless the court allows him to offset those expenses with monies received by Mrs. Nunley on Michelle's behalf from Social Security as a result of Mr. Brooks' disability.

Originally, in his Minute Entry dated April 26, 1991, the court allowed just such an offset. Subsequently, the court agreed to reconsider this issue, and Mrs. Nunley filed her Motion for Post-Trial Determination of Divorce Modification issues. (R. 527)

In so doing, Mrs. Nunley relied on the provisions of 42 U.S.C.A. § 407(a) which state that payments of this type are not transferrable or assignable and are not subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. Mrs. Nunley further relied on a letter written by Francis R. Darr, a Service Representative for the Social Security Administration (R. 544) which in essence described the nature of the benefits being received by Michelle and outlined the priority for their use as being: 1) shelter; 2) food; 3) medical and personal needs; and 4) the support of legally dependent family members.

Mr. Brooks argued, among other things, that § 407 does not apply to bar the credit and that the concerns raised by Ms. Darr were inaplicable because Mr. and Mrs. Nunley had earned anywhere from $80,000.00 to $94,000.00 per year from 1986 through 1989 and all of Michelle's basic needs were completely satisfied. He further relied on Utah Code Ann § 78-45-7.5 (1992) which expressly gives the court discretion in determining whether to apply such benefits to a parent's child support obligation. The court granted Mrs. Nunley's motion on the issue, reversed its ruling made on April 26th and denied Mr. Brooks credit for the benefits received

by Michelle on the basis that the court believed it did not have the authority to order the offset.

However, the court erred as a matter of law in reaching this conclusion, and this court can review the lower court's decision for correctness without any special deference. (See Howell v. Howell, 806 P.2d 1209, 1211 (Utah 1991).) To begin with, 42 USCA 407 is completely inapplicable to situations such as this. Instead, § 407 applies to protect a debtor's Social Security disability benefits from the distraint action of creditors so that the debtor has sufficient income with which to meet his most basic needs. This is not the issue here. Further, even where a creditor seeks to attach such benefits, courts have held that § 407 is inapplicable if the debtor can satisfy his basic needs. As argued by Mr. Brooks and as outlined by the Eleventh Circuit Court of Appeals in the case of United States v. Devalle, 704 F.2d 1513 (11th Cir. 1983):

> By insulating Social Security benefits from assignment or seizure, § 407 attempts to ensure that recipients have the resources necessary to meet their most basis needs. . . . Thus, when the assignment has the effect of denying the debtor basic resources, Section 407 is properly invoked. . . . However, when the debtor's ability to care for himself or herself is not implicated, Section 407 need not be applied.

Id. at 1516-17. (citations omitted, emphasis added)

Recognition of the inapplicability of § 407 is reflected in Utah Code Ann. § 78-45-7.5(8)(b) (1992). Section 78-45-7.5 relates to determination of gross income for purposes of computing child

support pursuant to the child support guidelines. Subsection (8)(b) states as follows:

> Social Security benefits received by a child due to the earnings of a parent may be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case.

Clearly, given the inapplicability of § 407 and the clear and unambiguous language of this statute, it was error as a matter of law for the court to conclude that it simply did not have the authority to credit Mr. Brooks with the Social Security disability benefits received by Michelle.

This conclusion is consistent with the conclusion reached by the courts of an overwhelming majority of the states, even those without express statutory authority upon which to rely. Most recently, the issue came before the Rhode Island Supreme Court in the case of Pontbriand v. Pontbriand, 622 A.2d 482 (R.I. 1993). (A copy of the Pontbriand case is attached to this brief as Exhibit C) In holding that an obligor parent's child support obligation may be offset by Social Security benefits paid to dependent children on behalf of that parent, the Rhode Island Supreme Court stated:

> The rationale for allowing a credit is perhaps best stated by a recent Indiana decision on the issue. 'The rationale is that the social security benefits are not gratuities but are earned, and they substitute for lost earning power because of the disability.'

Id. at 485. (citing Poynter v. Poynter, 590 N.E.2d 150 at 152 (Ind. Ct. App. 1992).)

The Rhode Island Supreme Court went on to emphasize that equity and fairness require such a result because the benefits paid to the children are funds earned by the obligor parent. Quoting the Supreme Court of Vermont, the Rhode Island Supreme Court stated:

> 'Equity and fairness demand that consideration be given to government child support benefits paid to the party having custody. These payments are, in a sense, a substitute for wages the obligor would have received but for the disability, and from which the court ordered payments would otherwise have been made. In theory, at least, the actual source of payments is of no concern to the party having custody as long as they are in fact made.'

Id. at 485. (quoting Davis v. Davis, 141 Vt. 398 at 401, 449 A.2d 947 at 948 (1982).) (emphasis in original)

Finally, not only should such payments be applied to a support obligation, the Rhode Island Supreme Court held that to require an obligor parent to seek a formal modification of a decree to claim such a credit is overly harsh and that the credit should instead be automatic after notification by the obligor parent that the support would be met through a different source.

A similar theory was relied on by the Supreme Court of Kansas in the case of Andler v. Andler, 217 Kan. 539, 538 P.2d 649 (1975). In reversing a lower court's decision refusing to allow such credit, the Kansas Supreme Court stated:

> Social Security benefits paid to the appellee for the benefit of the parties' minor children as the result of the appellant's disability may not, however, be regarded as gratuitous. On the contrary, the payments received by the appellee are for the children as beneficiaries

> of an insurance policy. The premiums for such policy were paid by the appellant for the children's benefit. The purpose of Social Security is the same as that of an insurance policy with a private carrier, wherein a father insures against his possible future disability and loss of gainful employment by providing for the fulfillment of his moral and legal obligations to his children. This tragedy having occurred, the insurer has paid out benefits to the beneficiaries under its contract of insurance with the appellant, and the purpose has been accomplished.

538 P.2d at 653.

Many other courts agree, and Mr. Brooks would refer this court to the following cases: Windham v. Alabama, 574 So.2d 853, 17 FLR 1130 (Ala Ct. Civ. App. 1990); Cash v. Cash, 353 SW.2d 348 (Ark. Sup. Ct. 1962); Lopez v. Lopez, 609 P.2d 579 (Ariz. Ct. App. 1980); In re Denny, 171 Cal. Rptr. 440, 7 FLR 2314 (Ct. of App. 1981); Perteet v. Sumner, 269 SE.2d 453 (Ga. Sup. Ct. 1980); Newman v. Newman, 451 NW.2d 843, 16 FLR 1197 (Iowa Sup. Ct. 1990); Childerson v. Hess, 555 N.E.2d 1070 (Ill. App. Ct. 1990); Poynter v. Poynter, 590 N.E.2d 150 (Ind. Ct. App. 1992); McCloud v. McCloud, 544 So.2d 764 (La. Ct. App. 1989); Frens v. Frens, 478 N.W.2d 750, 18 FLR 1206 (Mich. Ct. App. 1991); Mooneyham v. Mooneyham, 420 So.2d 1072, 9 FLR 2124 (Miss. Supt. Ct. 1982); Weaks v. Weaks, 821 S.W.2d 503 (Mo. Sup. Ct. 1991); Hanthorn v. Hanthorn. 460 N.W.2d 650 (Neb. Sup. Ct. 1990); Griffin v. Avery, 424 A.2d 175, 7 FLR 2226 (N.H. Sup. Ct. 1980); Romero v. Romero, 682 P.2d 201 (N.M. Ct. App. 1984); Guthmiller v. Guthmiller, 448 N.W.2d 643, 16 FLR 1064 (N.D. Sup. Ct. 1989); Davis v. Davis, 449 A.2d 947 (Vt. Sup. Ct. 1982)

Allowing a parent credit for disability benefits received by a minor child is the more reasoned approach, and coupled with Utah Code Ann. § 78-45-7.5(8)(b) clearly establishes that the lower court in this case erred, as a matter of law, in basing its order on a belief that the court did not have authority to grant a credit to Mr. Brooks for the disability benefits received by Michelle. In fact, in this case, this conclusion is even more compelling. Mr. Brooks is not attempting to offset his basic child support obligation in any way, and in fact stipulated to continue paying $300 per month despite the fact that pursuant to the Child Support Guidelines, his obligation would only be $252 per month. He simply seeks credit toward payment of an expense which for many people is a luxury item. Further, it was clear from the evidence before the court that there is no issue as to whether Michelle's basic food and shelter needs are being met. Mr. and Mrs. Nunley earned anywhere from $80,000 to $94,000 per year from 1986 through 1989.

As a result, if this court finds it was not an abuse of discretion to order Mr. Brooks to pay a portion of Michelle's private school expenses, then this court should vacate that portion of the Order modifying the Decree of Divorce that denies Mr. Brooks the credit at issue and enter its own order allowing him to offset his obligation with the Social Security benefits received by Michelle as a result of his disability.

III

THE COURT ABUSED ITS DISCRETION IN ALLOWING MRS. NUNLEY TO SUBMIT EVIDENCE AFTER THE CONCLUSION OF TRIAL TO ESTABLISH AMOUNTS CLAIMED

Two of the primary issues at trial in this case were Mrs. Nunley's claim that Mr. Brooks should be ordered to pay one-half of Michelle's private school expenses and one-half of her medical and dental expenses not covered by insurance and that she be awarded judgment against Mr. Brooks for amounts which had accrued prior to trial. Even so, there was absolutely no documentary evidence submitted by Mrs. Nunley at the time of trial which would establish amounts she had paid for which she was seeking reimbursement. In fact, the only evidence at trial presented by Mrs. Nunley with respect to Michelle's private school expenses is found at Plaintiff's Exhibit 5. This exhibit listed Michelle's total private school expenses per year to be $7,350.00, including extra curricular activities of $1,775.00. The only evidence relating to medical and dental expenses incurred was testimony elicited from Mrs. Nunley on cross- examination. She testified that she was seeking one-half of a $200.00 deductible and one-half of approximately $200.00 in medical bills. While she did not remember off-hand, she believed that Michelle's orthodontial work was in excess of $3000.00 or $4000.00. (See Trial transcript p. 58.)

It was not until November 1, 1991, over six month's after trial, that Mrs. Nunley submitted over one hundred and fifty pages of documents purporting to establish her claim that judgment should be entered against Mr. Brooks in the amount of $13,360.75 for private school expenses and in the amount of $805.23 for medical and dental expenses. Despite Mr. Brooks' repeated requests, the court refused to conduct a hearing wherein he would have an

opportunity to cross-examine Mrs. Nunley on the documents presented and make objections thereto.

The court's refusal was an abuse of discretion. Rule 43 of the Utah Rules of Civil Procedure governs the taking of evidence in trials and on motions. In all trials, the courts are required to take testimony of witnesses orally and in open court pursuant to Rule 43(a). Rule 43(b) addresses the issue of when a matter should be heard which is presented by motion. It states as follows:

> (b) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

While this provision grants to a lower court the discretion to determine whether or not to conduct a hearing and take oral testimony, the Utah Supreme Court has held that when disputed material facts are alleged in opposition to a motion, there should be an evidentiary hearing to resolve those issues. Specifically, in Stan Katz Real Estate, Inc. v. Chavez, 565 P.2d 1142 (Utah 1977), the Utah Supreme Court stated:

> We recognize that Rule 43(e) allows the District Court to grant or deny a motion on the sole or combined bases of affidavits, depositions or oral testimony. However, when no depositions have been taken and disputed material facts are alleged in opposing affidavits, there should be an evidentiary hearing to aid in the resolution of those facts. The reasons for requiring an evidentiary hearing under the circumstances were enunciated in Autera v. Robinson, 136 U.S. App.D.C. 216, 419 F.2nd 1197, 1202 (1969), as follows:

> 'Had no factual dispute arisen to plague the parties' substantive rights, we would perceive no difficulty in the judge's acceptance as a predicate for his action, of the facts represented through statements by members of the bar and affidavits of the parties or others. In this case, however, despite the factual questions developing as the hearing moved along, no opportunity was afforded anyone to test any representation by the chastening process of cross-examination . . . . The opportunity to judge credibility was non-existent as to the absent affiants; the opportunity to probe by cross-examination was completely lacking. Without these twin tools, normal in the trial of factual issues, the factual conclusion was certain to take on an unaccustomed quality of artificiality . . . We recognize, of course, that trial judges have a discretion to hear and determine ordinary motions either on affidavits or oral testimony portraying facts not appearing of record. We note, however, that an attempted resolution of factual disputes on conflicting affidavits alone may pose the question whether the discretion was properly exercised.'

565 P.2d at 1143. (Although the Utah Supreme Court cited Rule 43(e) and not 43(b), the court quoted the provisions of 43(e) in footnote no. 2, and it is identical to the current language of Rule 43(b))

The Utah Supreme Court concluded that "where a crucial conflict arises, as in this case, the matter should be resolved by depositions or an evidentiary hearing so that the factors for testing representations of witnesses as found in Autera, supra, [are utilized]" Id. at 1144.

This principle is further embodied in Rule 4-501 of the Utah Code of Judicial Administration which allows a party to request a hearing "where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice."

Pursuant to 4-501(3)(c), the court must grant the request unless the motion is frivolous or the issues have already been authoritatively decided.

Applying these principals to the facts of this case, the lower court abused its discretion in failing to allow Mr. Brooks an evidentiary hearing on expenses claimed by Mrs. Nunley and to allow the opportunity for cross-examination. To begin with, none of the documents produced in her Motion for Determination for Post-Trial Issues was submitted to Mr. Brooks in the course of discovery in this case, and none of it was presented at trial in April of 1991. No reason was offered for Mrs. Nunley's failure to timely present the evidence, and it was not submitted to the court or Mr. Brooks until six months after trial.

In a written memoranda, Mr. Brooks set forth numerous objections to the timeliness of the submission of evidence and argued it should be barred by Mrs. Nunley's failure to submit it at trial. Mr. Brooks also raised objections to the documents themselves. These included the following: 1) some of the documents had absolutely no reference to the date the expense was purportedly incurred by Mrs. Nunley; 2) certain of the documents which did have dates placed those expenses at a time prior to Mrs. Nunley's filing of her Amended Petition to Modify despite the court's order that she was entitled to reimbursement only from that day forward; 3) certain of the documents were illegible; and (4) there was no evidence with respect to whether or not medical and dental expenses had been submitted to an insurance carrier and what

portion, if any, had been paid the carrier. (R. 777 through 786) These objections and defenses raise what the Utah Supreme Court defined as a "crucial conflict" in the Stan Katz Real Estate case, supra, and the issues should have been resolved by an evidentiary hearing so that the representations could be submitted to the "chastening process of cross-examination" and the opportunity to judge the credibility of the witnesses.

Mrs. Nunley will argue that the document in which these defenses were raised was not timely filed by Mr. Brooks and was therefore appropriately stricken by the court. However, the court's granting Mrs. Nunley's motion to strike this memorandum was an abuse of discretion and contrary to the law of this case. Previously, the court allowed Mrs. Nunley an opportunity to submit documentary evidence on primary issues of this case despite the fact that she failed to do so at time of trial. In addition, at the August 9, 1991 hearing when the court agreed to allow Mrs. Nunley an opportunity to submit her motion to amend pursuant to Rule 4-501 of the Utah Code of Judicial Administration, the court anticipated that the motion would be filed prior to the end of the month. Counsel for Mr. Brooks was expressly given 30 days within which to respond to Mrs. Nunley's motion, with the caveat that his response would be due no sooner than September 6, 1991. Even so, Mrs. Nunley's motion was not filed until November 1, 1991. Although the motion was not timely made, the court denied Mr. Brooks' motion to strike it on that basis. (R. 376-379 and R. 732) Given the seriousness of the issues and given the court's

willingness to allow Mrs. Nunley to submit evidence and motions in an untimely fashion, it was an abuse of discretion to strike a response by Mr. Brooks raising legitimate objections and defenses.

Based upon the foregoing, if this court does not alter Mr. Brooks' obligation to pay private school expenses, then this court should vacate the judgment against Mr. Brooks for past due medical and dental expenses and private school expenses and remand the issue of arrearages for a full evidentiary hearing before the trial court.

CONCLUSION

It was an abuse of discretion for the lower court to modify the Decree of Divorce in this case to require Mr. Brooks to pay a portion of Michelle's private school expenses. The evidence in the record is clear and there can be only two conclusions: 1) there was no substantial change of circumstances entitling Mrs. Nunley to this modification; and 2) Mr. Brooks does not have the financial ability to pay such expenses. This court should simply vacate the order in this regard and enter its own order denying Mrs. Nunley's claim. In the alternative, should this court uphold the order requiring Mr. Brooks to pay a portion of Michelle's private school expenses, it should enter its own order granting Mr. Brooks credit towards his obligation for Social Security benefits received by Michelle as a result of his disability. Finally, if Mr. Brooks is to be responsible for arrearages in medical, dental and private school expenses, then he is entitled to a hearing to determine the

amount of those arrearages and his financial ability to satisfy the obligation, and these issues should be remanded accordingly.

Dated this 4th day of June, 1993.

LIAPIS, GRAY, STEGALL & GREEN

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DELIVERY CERTIFICATE

I hereby certify that on this 4th day of June, 1993, I caused to be hand delivered two copies of the foregoing Brief of Defendant-Appellant to:

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ADDENDUM

EXHIBIT A

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Attorney for Plaintiff

IN THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

JO ANN BROOKS (NUNLEY),	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Case No. C 88 4192
THOMAS M. BROOKS,	)	
	)	
Defendant.	)	Judge Richard H. Moffat

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's "Amended Petition for Modification of Decree of Divorce" and Defendant's "Countermotion" came on regularly for trial on the 22nd day of April, 1991 before the Honorable Richard H. Moffat. Plaintiff appeared in person and by and through her attorney of record, Randall J. Holmgren. Defendant appeared in person and by and through his attorney of record, Paul H. Liapis. The Court heard the sworn testimony of Plaintiff and Defendant, marked and received documents and exhibits in support of the positions of Plaintiff and Defendant, heard arguments of counsel, reviewed the records and

files herein and, took the matter under advisement and thereafter issued its Minute Entry on the 26th day of April, 1991.

Following the issuance of said Minute Entry, the Plaintiff filed a Motion for Clarification of Ruling and Defendant filed a Countermotion for Attorney Fees. Defendant submitted proposed Findings of Fact and Conclusions of Law to the Court on or about June 3, 1991, and Plaintiff objected to those proposed Findings and Conclusions and submitted her own proposed Findings of Fact (with footnotes indicating the portions of the Court's April 26, 1991 Minute Entry and Defendant's proposed Findings of Fact needing clarification). The Plaintiff's Motion for Clarification and the Defendant's Countermotion for Attorney Fees were heard on August 7, 1991.

The Court entered an Order (Re: Plaintiff's Motion for Clarification of Ruling and Defendant's Countermotion for Attorney Fees) on December 3, 1991. In said Order, portions of the April 26, 1991 Minute Entry were clarified and other portions were reserved for further review. In particular, said Order directed Plaintiff to submit a motion and supporting memorandum to the Court, pursuant to Rule 4-501 of the Utah Code of Judicial Administration, addressing the issues that the Court reserved for further review. The Court directed that entry of the Findings of Fact, Conclusions of Law, and Divorce Modification Order be delayed until such time as such post-trial motion was submitted and ruled on so that the issues thereby resolved, together with the issues clarified by the December 3, 1991

Order, could be included in the final Findings, Conclusions, and modification of decree Order pertaining to the April 22, 1991.

On or about November 1, 1991, Plaintiff submitted her "Motion for Post-Trial Determination of Divorce Modification Issues," as directed by the Court. The Motion was opposed by Defendant. The matter was submitted to the Court in accordance with Rule 4-501 of the Utah Code of Judicial Administration. The Court issued a Minute Entry ruling dated December 19, 1991 and entered an "Order (Re: Motion for Post-Trial Determination of Divorce Modification Issues)" on January 10, 1992.

On or about March 6, 1992, upon the request of the Defendant, the Court instructed Plaintiff and Defendant to submit an accounting to the Court with respect to the amounts expended by Plaintiff on behalf of the parties' minor child, Michelle, for private school, tuition, books, uniforms, school supplies and school activities, and medical, dental and prescription expenses. Accordingly, on or about May 15, 1992, Defendant submitted "Defendant's Response to Accounting Pursuant to Court's Request." On or about May 19, 1992, Plaintiff submitted "Plaintiff's Response and Objection to 'Defendant's Response to Accounting Pursuant to Court's Request'." Pursuant to Rule 4-501 of the Utah Rules of Judicial Administration, the Court issued a Minute Entry ruling dated July 22, 1992.

The Court having duly considered the foregoing, incorporates herein its trial ruling (i.e., 4/26/91 Minute Entry), its post-trial Orders dated December 3, 1991 and January 10,

1992, and its Minute Entry dated July 22, 1992, and the Court does now make, adopt and find the following:

FINDINGS OF FACT

1. Plaintiff and Defendant were divorced on the 14th day of August, 1985 in the State of California pursuant to a written divorce settlement agreement.

2. Plaintiff and Defendant were awarded joint legal and physical custody of the minor child, Michelle Nohealani Brooks, now age 11, born September 18, 1980. Plaintiff was awarded the primary physical custody of said child and Defendant was awarded specified custodial rights with said child, and Plaintiff, JO ANN NUNLEY (BROOKS), was ordered to bear the expense of the transportation of the minor child to and from Los Angeles, California to visit the Defendant, THOMAS M. BROOKS, during his on-schedule custodial period.

3. The Decree of Divorce required the Defendant to pay to Plaintiff child support in the sum of $300.00 per month on the 1st day of each month commencing on the 1st day of August, 1985, and continuing until the said child reaches the age of eighteen (18), joins the armed forces, is fully employed, is married, is emancipated or upon her death. Plaintiff was further ordered to pay to Defendant $100.00 per month as child support if the minor child resided with the Defendant for sixteen (16) days or more in any month.

4. The Court finds that at the time of the entry of the Decree of Divorce, the Plaintiff was employed with TWA Airlines, with a gross year-end income of $28,687.24, or a gross monthly amount of $2,390.60. The Court finds that the Defendant was receiving disability income at the time of the entry of the Decree of Divorce and, pursuant to the Settlement Agreement of the parties, had a net income of $1,600.00 per month.

5. The Court finds that the Defendant, THOMAS M. BROOKS, has a current gross income of $3,029.26 per month. The Court bases this finding on all of the evidence submitted at trial, including the evidence that his disability and social security income is tax-free, and including his income producing capabilities, and the Court believes that the finding is based on due consideration of all of the evidence.

6. The Court finds that the income of the Plaintiff is approximately $10,000.00 per year (or about $833.00 per month), based upon the stipulated testimony of the Plaintiff at trial, and the Court finds that her imputed income should be approximately $833.00 per month. The Court did not find evidence to support a finding that Plaintiff was earning more than her stipulated income of $10,000.00 per year.

7. The Court finds that there has not been a substantial and material change of circumstances based upon its finding that Plaintiff has a minimum of $833.00 gross per month from her costume business, and further that she earned a profit of approximately $4,493.00 for the tax year 1990 from her costume business, that she had incorporated into her tax return a rental write-off of $5,400.00 while operating this business out of her home,

and that the Plaintiff had the ability to write-off substantial amounts of expenses through her business, without being required to take money from the business in a taxable form. The Court notes that the Defendant claims a $400.00 per month expenditure to maintain his Ferrari automobile and that the total of Defendant's checking account deposits for the period May 16, 1988 through July 17, 1990, shows approximately $173,000.00 of deposits and $171,000.00 of withdrawals. While there are certain explanations made which could explain some of the discrepancy, it certainly did not describe or explain away all of the discrepancy as to the Defendant's expenditures.

8. The Court further finds that the Defendant stated that he was willing to pay child support at the rate of $300.00 per month for his share of the minor child's daily needs, and acknowledged that said amount was higher than the sum calculated under the Uniform Child Support Worksheet.

9. The Court is of the opinion that the exhibits and testimony produced by both parties at the time of the trial do not fully reveal the nature and extent of their respective incomes and, therefore, the Court cannot draw any more specific findings from the evidence presented at the time of the trial as to either party's income.

10. The Court finds from the evidence presented and its additional findings set forth above, that Plaintiff and Defendant clearly have additional income which the Court has not been able to compute and arrive at a figure for each party. The Court's best judgment is that it is at a level which does not justify a finding of a substantial change of

material circumstances and, therefore, the child support sum of $300.00 per month should be left in place, particularly in view of the Defendant's willingness to keep the child support at its current level of $300.00 per month.

11. For all of the above-said reasons, the Court found that the Plaintiff had failed to prove a material and substantial change of circumstances to justify the increase in child support sought by the Plaintiff in this matter.

12. The Court finds, as to the visitation transportation expenses, that the reason and basis upon which the original transportation order in this matter was entered (i.e., the California Divorce Decree) was that Plaintiff was then employed by TWA airlines and could thus provide free transportation, or at least it was contemplated that Plaintiff could provide free transportation, for the minor child from Salt Lake City to Defendant's home in Los Angeles. The Court further finds that Plaintiff is no longer employed by TWA and cannot provide free transportation for the minor child.

13. The Court notes that Plaintiff's husband (an airline employee) has access to passes and/or discount fares for his family. The Court finds that it is willing to find that Plaintiff should ask her husband to secure discount tickets for travel of the minor child to and from Defendant's visitation. If Plaintiff's husband is willing to do so, Plaintiff should then send a photocopy of the front page of the itinerary part of the ticket indicating the amount paid, and Defendant is to reimburse Plaintiff for his one-half of that amount one (1) week prior to the flight. The Court finds that if Defendant does not reimburse Plaintiff

for his one-half, then no visitation should occur. The Court finds that such visitation should be agreed upon at least thirty (30) days prior to the scheduled visitation and all parties should cooperate to effectuate these arrangements. The Court also finds that if Plaintiff's husband if unable to secure such discount tickets or is unwilling to do so, Plaintiff should then buy the tickets and send Defendant a photocopy for reimbursement under the conditions set forth above. The Courts finds that the Plaintiff should cooperate in seeing that the Defendant has all of the custodial visitation rights he was awarded under the California Decree of Divorce.

14. The Court finds that in addition to the above loss of Plaintiff's TWA benefits that the Defendant has moved from Los Angeles, California to Montana and the Court finds, in a technical sense, that Plaintiff's responsibility for payment of transportation for the minor child's visit would terminate upon that condition.

15. Without relying on the technical statement above, the Court is of the opinion that clearly the parties contemplated the furnishing of that transportation through Plaintiff' employment as a perk, at no cost to the Plaintiff, and on that basis, she was willing to provide the benefit to the parties.

16. The Court finds that all of the above constitute a sufficient, substantial and material change of circumstances to require each party to share equally the costs of transportation for Defendant's visitation until the minor child reaches the age of 18 and

graduates from high school during her normal and expected year of graduation or until further order of this Court.

17. The Court finds that Plaintiff should reimburse Defendant for one-half of the transportation costs that Defendant has reasonably incurred in exercising his visitation rights with the minor child of the parties. Based upon the Court's review of Plaintiff's and Defendant's "Response to Accounting Pursuant to Court Request", said expenses total $2,534.50 for visitation expenses from November 21, 1988 through March 27, 1991. Therefore, Plaintiff should be ordered to pay Defendant for one-half of $2,534.50 or $1,267.25 and judgment should enter accordingly.

18. The Court finds that the Plaintiff has enrolled the minor child in a private school, Rowland-Hall St. Mark's, and that she has expended substantial sums of money to keep said child in a private school. The Court further finds that both Plaintiff and Defendant are desirous for their child to be enrolled in private school. The Court finds that the Defendant noted that he did not believe that he had the ability to maintain the costs to maintain the minor child in private school.

19. The Court finds that Plaintiff and Defendant should pay one-half of the private school tuition, books, supplies, school activities, and school uniforms from the date of Plaintiff's Amended Petition, November 21, 1988, when this issue was first raised by Plaintiff, until the child ceases to attend private school or until further order of this Court.

20. The Court finds that subsequent to the trial in this matter, Plaintiff presented a letter, over the objection of Defendant's counsel, from an employee of the Social Security Administration, dated July 12, 1991, indicating that the Court could not assign or determine how benefits paid to the minor child could be used. The Court was subsequently requested by counsel for Plaintiff to permit the filing of a Motion for Post-Trial Determination of this social security issue and the Court found that the matter should be submitted to it under Rule 4-501 of the Code of Judicial Administration. Defendant was to respond to that Motion within thirty (30) days after filing and no sooner than the 6th of September, 1991.

21. The Court finds, after review of the matters submitted to it under the "Motion for Post-Trial Determination," that contrary to its April 26, 1991 trial Minute Entry, it does not have the power to assign the social security auxiliary benefits received by the parties' minor child (by reason of Defendant's permanent disability) to meet the Defendant's obligation to pay one-half of the child's private-school expenses. The social security auxiliary benefits received by the minor child do not reduce the disability benefits otherwise due to or received by the Defendant and, in fact, said auxiliary benefits are for the minor child's use only and cannot be judicially assigned or designated for any other use. The Court finds that the Defendant should meet his obligations for one-half of the minor child's private school expenses from his own resources and not from the child's social security benefits.

22. The Court finds, based upon the information provided under the "Motion for Post-Trial Determination," and the Court's review of Plaintiff's and Defendant's "Response to Accounting Pursuant to Court Request," that the parties have agreed that Plaintiff has incurred the sum of $19,160.00 for Michelle's private school expenses which include tuition, interest, insurance, books, supplies, school activities and school uniforms from November 21, 1988 through September 16, 1991. The Court finds that Defendant should pay Plaintiff one-half of said amount, or $9,580.00, and judgment should enter accordingly.

23. The Court finds, based upon the information provided under the "Motion for Post-Trial Determination," and the Court's review of Plaintiff's and Defendant's "Response to Accounting Pursuant to Court Request," that Plaintiff has incurred an additional sum of $5,801.38 for Michelle's private school expenses which include school activities, supplies and school uniforms. The Court finds that Defendant should pay Plaintiff one-half of said amount, or $2,900.69, and judgment should enter accordingly.

24. The Court further finds that the parties should share equally the cost of such expenses that are incurred after September 16, 1991 until the child ceases to attend private school or until further order of this Court.

25. The Court finds, based upon the information provided under the "Motion for Post-Trial Determination," and the Court's review of Plaintiff's and Defendant's "Response to Accounting Pursuant to Court's Request," that the Plaintiff has incurred medical, dental and prescription expenses (not covered by Insurance) from November 21, 1988 through

March 31, 1992, for the minor child, Michelle, of $1,157.24. The Court finds that Defendant should pay Plaintiff one-half of said amount, or $578.62, and judgment should enter accordingly.

26. The Court finds that the parties should share equally, from March 31, 1992, one-half of the insurance deductibles and noncovered medical, dental and prescription expenses for the minor child, Michelle, until she attains the age of eighteen (18) and has graduated from high school during her normal and expected year of graduation or until further order of this Court.

27. The Court finds that while the extracurricular activities of the minor child as shown on Plaintiff's trial Exhibit 5, may be advantageous to the minor child and may be desirable, the Court finds that the Defendant should not be obligated to pay one-half of those expenses.

28. The Court finds that it has no intention at this point in ruling that Plaintiff is at risk to return Michelle's benefits to social security if it is subsequently determined that the Defendant is not legally disabled.

29. The Court finds that the amounts awarded to Plaintiff and against Defendant by way of judgment (in parag. 22 above) for the minor child's private school tuition, books, supplies, school activities and school uniforms is $12,480.69. Defendant's one-half share of Michelle's medicals is $578.62. The total of $13,059.31 should be reduced by the judgment

entered against Plaintiff for reimbursement of visitation transportation costs of $1,267.25, leaving a judgment owing in Plaintiff's favor against Defendant in the sum of $11,792.06.

30. The Court has taken into consideration the earning capability and the income level of the Defendant in determining the obligations he is to pay on behalf of the parties' minor child. The Court finds that Defendant has the ability to pay the obligations imposed herein.

31. The Court finds that both Plaintiff and Defendant have incurred attorneys' fees in this matter. The Court finds that neither of the parties are entitled to an award of attorney's fees from the other and that each should bear their own expenses and fees.

From the foregoing Findings of Fact, the Court now makes and adopts the following:

CONCLUSIONS OF LAW

1. Plaintiff's Petition to increase child support for the minor child, should be denied.

2. The prior order of support established by the California Court requiring Defendant to pay to Plaintiff $300.00 per month as child support should remain in full force and effect.

3. A substantial and material change of circumstances has occurred with the Defendant's move to the State of Montana and the Plaintiff's loss of travel benefits from her former employer, TWA Airlines. The prior custodial visitation order that Plaintiff pay all

transportation costs should be amended to require each of the parties to share equally, at the best available rate, all of the costs of transportation for the child from Utah to Defendant's residence until the minor child reaches the age of 18 and graduates from high school during her normal and expected year of graduation or until further order of this Court. Plaintiff should be ordered to ask her husband (an airline employee) to secure discount tickets for travel of the minor child to and from Defendant's visitation. If Plaintiff's husband is willing to do so, Plaintiff should then send a photocopy of the front page of the itinerary part of the ticket indicating the amount paid, and Defendant is to reimburse Plaintiff for his one-half of that amount one (1) week prior to the flight. If Defendant does not reimburse Plaintiff for his one-half, at least one (1) week prior to the flight, then no visitation should occur. Such visitation should be agreed upon at least thirty (30) days prior to the scheduled visitation and all parties should cooperate to effectuate these arrangements. If Plaintiff's husband if unable to secure such discount tickets or is unwilling to do so, Plaintiff should then buy the tickets and send Defendant a photocopy for reimbursement under the conditions set forth above. The parties should cooperate in seeing that the Defendant has all of the custodial visitation rights he was awarded under the California Decree of Divorce.

4. Defendant should be awarded judgment against Plaintiff for one-half of those amounts incurred by the Defendant for transportation costs to accomplish his visitation from November 21, 1988 through March 27, 1991 in the sum of $1,267.25.

5. Plaintiff should be awarded a judgment against the Defendant for his share of the minor child's private school tuition, interest, insurance, books, fees, uniforms and school activities in the sum of $9,580.00 from November 21, 1988 through September 16, 1991.

6. Plaintiff should be awarded a judgment against the Defendant for his share of the minor child's additional private school activities, supplies and school uniforms in the sum of $2,900.69 from November 21, 1988 through September 16, 1991.

7. Plaintiff should be awarded a judgment against the Defendant for his share of the minor child's medical, dental and prescription expenses in the sum of $578.62 from November 21, 1988 through March 31, 1992.

8. The judgment awarded to Defendant above of $1,267.25 is to be applied toward the three (3) judgments awarded to Plaintiff, totalling $13,059.31, leaving a new amount in favor of Plaintiff and against Defendant in the sum of $11,792.06.

9. Plaintiff and Defendant should pay one-half of the minor child's private school tuition, books, supplies, school activities and school uniforms from September 16, 1991 until the child ceases to attend private school or until further order of this Court.

10. On the social security issue, the Court hereby amends its prior ruling in its Minute Entry of April 26, 1991 and awards all amounts that have been paid to the minor child, Michelle, as her benefits under the social security auxiliary benefits received (due to Defendant's permanent disability) to the minor child as her proceeds, and the same are not

to be credited toward any amount of support for the minor child by Defendant or to cover her private school costs.

11. The parties should share equally, from March 31, 1992, one-half of the insurance deductibles and noncovered medical, dental and prescription expenses for the minor child, Michelle, until she attains the age of eighteen (18) and has graduated from high school during her normal and expected year of graduation or until further order of this Court.

12. The Defendant should not be obligated to pay one-half of the minor child's extracurricular activities.

13. The Court makes no ruling with regard to Plaintiff's risk to return Michelle's benefits to social security if it is subsequently determined that the Defendant is not legally disabled.

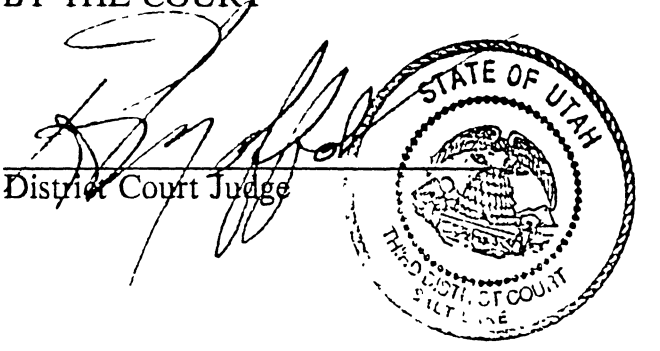
14. The Court has taken into consideration the earning capability and the income level of the Defendant in determining Defendant's obligations on behalf of the parties' minor child. Defendant has the ability to pay the obligations imposed herein.

15. Neither Plaintiff nor Defendant should be awarded any attorneys' fee or costs in this matter, and each should assume and pay their own fees incurred.

16. All remaining provisions of the California Order not amended, modified or altered by this Order should remain in full force and effect.

Date: October 2nd, 1992.

BY THE COURT



District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I personally caused to be mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law, postage prepaid, to the following, on this 30 day of Sept., 1992.

Paul H. Liapis
Liapis, Gray, Stegall & Green
New York Building, #300
48 Post Office Place
Salt Lake City, Utah 84101

Laura L. Hoins

Laura L. Hoins

RANDALL J. HOLMGREN, #4054
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Attorney for Plaintiff

IN THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

2177850
10-8-92-800am.

JO ANN BROOKS (NUNLEY),	)	191 1010
Plaintiff,	)	
vs.	)	
	)	Case No. C 88 4192
THOMAS M. BROOKS,	)	
Defendant.	)	Judge Richard H. Moffat

ORDER MODIFYING DECREE OF DIVORCE

Plaintiff's "Amended Petition for Modification of Decree of Divorce" and Defendant's "Countermotion" came on regularly for trial on the 22nd day of April, 1991 before the Honorable Richard H. Moffat. Plaintiff appeared in person and by and through her attorney of record, Randall J. Holmgren. Defendant appeared in person and by and through his attorney of record, Paul H. Liapis. The Court heard the sworn testimony of Plaintiff and Defendant, marked and received documents and exhibits in support of the positions of Plaintiff and Defendant, heard arguments of counsel, reviewed the records and

files herein and, took the matter under advisement and thereafter issued its Minute Entry on the 26th day of April, 1991.

Following the issuance of said Minute Entry, the Plaintiff filed a Motion for Clarification of Ruling and Defendant filed a Countermotion for Attorney Fees. Defendant submitted proposed Findings of Fact and Conclusions of Law to the Court on or about June 3, 1991, and Plaintiff objected to those proposed Findings and Conclusions and submitted her own proposed Findings of Fact (with footnotes indicating the portions of the Court's April 26, 1991 Minute Entry and Defendant's proposed Findings of Fact needing clarification). The Plaintiff's Motion for Clarification and the Defendant's Countermotion for Attorney Fees were heard on August 7, 1991.

The Court entered an Order (Re: Plaintiff's Motion for Clarification of Ruling and Defendant's Countermotion for Attorney Fees) on December 3, 1991. In said Order, portions of the April 26, 1991 Minute Entry were clarified and other portions were reserved for further review. In particular, said Order directed Plaintiff to submit a motion and supporting memorandum to the Court, pursuant to Rule 4-501 of the Utah Code of Judicial Administration, addressing the issues that the Court reserved for further review. The Court directed that entry of the Findings of Fact, Conclusions of Law, and Divorce Modification Order be delayed until such time as such post-trial motion was submitted and ruled on so that the issues thereby resolved, together with the issues clarified by the December 3, 1991

Order, could be included in the final Findings, Conclusions, and modification of decree Order pertaining to the April 22, 1991.

On or about November 1, 1991, Plaintiff submitted her "Motion for Post-Trial Determination of Divorce Modification Issues," as directed by the Court. The Motion was opposed by Defendant. The matter was submitted to the Court in accordance with Rule 4-501 of the Utah Code of Judicial Administration. The Court issued a Minute Entry ruling dated December 19, 1991 and entered an "Order (Re: Motion for Post-Trial Determination of Divorce Modification Issues)" on January 10, 1992.

On or about March 6, 1992, upon the request of the Defendant, the Court instructed Plaintiff and Defendant to submit an accounting to the Court with respect to the amounts expended by Plaintiff on behalf of the parties' minor child, Michelle, for private school, tuition, books, uniforms, school supplies and school activities, and medical, dental and prescription expenses. Accordingly, on or about May 15, 1992, Defendant submitted "Defendant's Response to Accounting Pursuant to Court's Request." On or about May 19, 1992, Plaintiff submitted "Plaintiff's Response and Objection to 'Defendant's Response to Accounting Pursuant to Court's Request'." Pursuant to Rule 4-501 of the Utah Rules of Judicial Administration, the Court issued a Minute Entry ruling dated July 22, 1992.

The Court having duly considered the foregoing, incorporates herein its trial ruling (i.e., 4/26/91 Minute Entry), its post-trial Orders dated December 3, 1991 and January 10,

1992, and its Minute Entry dated July 22, 1992, and the Court having entered its written Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff's Petition to increase child support for the minor child is hereby denied.

2. The prior order of support established by the California Court requiring Defendant to pay to Plaintiff $300.00 per month as child support will remain in full force and effect.

3. A substantial and material change of circumstances has occurred with the Defendant's move to the State of Montana and the Plaintiff's loss of travel benefits from her former employer, TWA Airlines. The prior custodial visitation order that Plaintiff pay all transportation costs is hereby amended to require each of the parties to share equally, at the best available rate, all of the costs of transportation for the child from Utah to Defendant's residence until the minor child reaches the age of 18 and graduates from high school during her normal and expected year of graduation or until further order of this Court. Plaintiff is ordered to ask her husband (an airline employee) to secure discount tickets for travel of the minor child to and from Defendant's visitation. If Plaintiff's husband is willing to do so, Plaintiff shall then send a photocopy of the front page of the itinerary part of the ticket indicating the amount paid, and Defendant is to reimburse Plaintiff for his one-half of that amount one (1) week prior to the flight. If Defendant does not reimburse

Plaintiff for his one-half, at least one (1) week prior to the flight, then no visitation will occur. Visitation will be agreed upon at least thirty (30) days prior to the scheduled visitation and all parties will cooperate to effectuate these arrangements. If Plaintiff's husband if unable to secure such discount tickets or is unwilling to do so, Plaintiff shall then buy the tickets and send Defendant a photocopy for reimbursement under the conditions set forth above. The parties are ordered to will cooperate in seeing that the Defendant has all of the custodial visitation rights he was awarded under the California Decree of Divorce.

4. Defendant be and he is hereby awarded judgment against Plaintiff for one-half of those amounts incurred by the Defendant for transportation costs to accomplish his visitation from November 21, 1988 through March 27, 1991 in the sum of $1,267.25.

5. Plaintiff be and she is hereby awarded a judgment against the Defendant for his share of the minor child's private school tuition, interest, insurance, books, fees, uniforms and school activities in the sum of $9,580.00 from November 21, 1988 through September 16, 1991.

6. Plaintiff be and she is hereby awarded a judgment against the Defendant for his share of the minor child's additional private school activities, supplies and uniforms in the sum of $2,900.69 from November 21, 1988 through September 16, 1991.

7. Plaintiff be and she is hereby awarded a judgment against the Defendant for his share of the minor child's medical, dental and prescription expenses in the sum of $578.62 from November 21, 1988 through March 31, 1992.

8. The judgment awarded to Defendant above of $1,267.25 is to be applied toward the three (3) judgments awarded to Plaintiff, totalling $13,059.31, leaving a new judgment in favor of Plaintiff and against Defendant in the sum of $11,792.06.

9. Plaintiff and Defendant are hereby ordered to pay one-half of the minor child's private school tuition, books, supplies, school activities and school uniforms from September 16, 1991 until the child ceases to attend private school or until further order of this Court.

10. On the social security issue, the Court orders that the amounts paid to the minor child, Michelle, as her benefits under the social security auxiliary benefits received (due to Defendant's permanent disability) are the minor child's and the same are not to be credited toward any amount of support for the minor child by Defendant or to cover her private school costs.

11. The parties are hereby ordered to share equally, from March 31, 1992, one-half of the insurance deductibles and noncovered medical, dental and prescription expenses for the minor child, Michelle, until she attains the age of eighteen (18) and has graduated from high school during her normal and expected year of graduation or until further order of this Court.

12. The Defendant is not obligated to pay one-half of the minor child's extracurricular activities.

13. The Court makes no ruling with regard to Plaintiff's risk to return Michelle's benefits to social security if it is subsequently determined that the Defendant is not legally disabled.

14. The Court has taken into consideration the earning capability and the income level of the Defendant in determining Defendant's obligations on behalf of the parties' minor child. Defendant has the ability to pay the obligations imposed herein.

15. Neither Plaintiff nor Defendant shall be awarded any attorneys' fee or costs in this matter, and each shall assume and pay their own fees incurred.

16. All remaining provisions of the California Order not amended, modified or altered by this Order should remain in full force and effect.

Date: _____, 199_

BY THE COURT

_____
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I personally caused to be mailed a true and correct copy of the foregoing Order Modifying Decree of Divorce, postage prepaid, to the following, on this 30 day of Sept., 1992.

Paul H. Liapis
Liapis, Gray, Stegall & Green
New York Building, #300
48 Post Office Place
Salt Lake City, Utah 84101

Laura L. Hoins
Laura L. Hoins

EXHIBIT B

connected the defendant to the forcible entry and wrongful taking beyond any reasonable doubt. The court did not err in denying the defendant's motion for acquittal or to set aside the verdict.

The defendant claims that the court erred in its instructions to the jury on circumstantial evidence and by not charging the jury as he requested. The paragraphs of the requested charge at issue dealt essentially with circumstantial evidence.[3] A resolution of the charge on circumstantial evidence is dispositive of these claimed errors.

The court charged the jury in part as follows: "You may give such weight as you may determine to the manner in which counsel have put their evidence together and apply it to the law. You may draw from any facts which have been admitted or proved to you such inferences as are reasonable and logical. Inferences should not be drawn but from logical relation to facts which you have found to be proved or admitted. You should not base any inferences on things that you might surmise, speculate or guess. This is what is called circumstantial evidence. Drawing of inferences from facts found, admitted or proved to prove a material fact." The judge also charged the jury that the presumption of innocence "requires if a piece of evidence offered is capable of two reasonable constructions, one of which favors innocence, it must be given the construction favoring innocence."

[5, 6] The charge must be considered from the standpoint of its effect on the jury in guiding them to a proper verdict. *State v. Rose*, 169 Conn. 683, 688–89, 363 A.2d 1077 (1975); *State v. Bell*, 153 Conn. 540, 544, 219 A.2d 218 (1966). After reviewing the court's instruction on the law of circumstantial evidence in light of the charge as a whole; *State v. Theriault*, — Conn. —, —, 438 A.2d 432 (1980); *State v. Roy*, 173 Conn. 35, 40, 376 A.2d 391 (1977); we are of the opinion that it was satisfactory and correct. The charge as given adequately instructed the jury and gave them a clear understanding of circumstantial evidence. See *Reliance Ins. Co. v. Commission on Human Rights & Opportunities*, 172 Conn. 485, 489–90, 374 A.2d 1104 (1977); *State v. Schoenbneelt*, 171 Conn. 119, 126, 368 A.2d 117 (1976).

There is no error.

In this opinion the other Judges concurred.

Cathleen HARDISTY

v.

Garwin D. HARDISTY.

Supreme Court of Connecticut.

Argued Jan. 8, 1981.

Decided March 3, 1981.

Former wife filed motion to modify support and alimony, alleging substantial and material changes in circumstances. The Superior Court, District of Waterbury, Bieluch, J., modified outstanding orders of alimony and support, and husband appealed. The Supreme Court, Peters, J., held that: (1) sustaining wife's objection to question posed to husband by husband's counsel about value of husband's restaurant if lease on property were no longer in effect was not an abuse of discretion; (2) sustaining objection to question posed to husband by husband's counsel of whether husband might be unable to pay for college education for son in event that husband was required to pay for a private secondary school education for son was not abuse of

3. The defendant also claimed the court erred in failing to instruct the jury as he requested with two other paragraphs of his requested charge. Since this error has not been briefed, it is considered abandoned. *State v. Washington*, — Conn. —, —, 438 A.2d 1144 (1980); *State v. Ruiz*, 171 Conn. 264, 265, 368 A.2d 222 (1976).

discretion; (3) conclusion that there had been sufficient change of circumstances so that trial court could properly entertain motion for modification of alimony and support was not error; (4) modification of award of alimony and award of support for daughter was not error, but (5) modification of support award for son to require husband to pay son's expenses at private secondary school was abuse of discretion, as was award of $3,000 retroactive support for past private secondary school expenses.

Error in part; remanded for further proceedings.

1. Divorce ⇐245(3), 309.3(1)

In proceeding brought by wife to modify husband's alimony and child support payments, sustaining wife's objection to question posed to husband by husband's counsel about value of husband's restaurant if lease on property were no longer in effect was not abuse of discretion.

2. Divorce ⇐309.3(1)

In proceeding brought by wife to modify husband's alimony and child support payments, sustaining wife's objection to question posed to husband by husband's counsel as to husband's ability to pay for college education for son in event that husband were required to pay for a private secondary school education for son was not abuse of discretion.

3. Divorce ⇐245(3), 309.6

Conclusion that there had been sufficient change of circumstances in financial affairs of husband whose income in four years since divorce was two and one half to three times what it had been at time of divorce and whose assets were five times as valuable, so that trial court could properly entertain motion for modification of alimony and child support was not error.

4. Divorce ⇐245(2), 309.2(2)

Proceeding to modify alimony and child support payments may be premised upon showing of substantial change in circumstances of either party to original decree. C.G.S.A. § 46–54 (Repealed).

5. Divorce ⇐245(2), 309.2(1)

Once trial court determines that there has been substantial change in financial circumstances of one of the parties, same criteria that determined initial award of alimony and child support are relevant to question of modification; these require court to consider, without limitation, needs and financial resources of each of parties and their children, as well as such factors as health, age and station in life. C.G.S.A. §§ 46–52, 46–57 (Repealed.)

6. Divorce ⇐245(1), 309.4

In making its determination of applicability of criteria relevant to question of modification of award of alimony and child support, trial court has broad discretion.

7. Divorce ⇐245(2), 309.2(3)

Modification of award of alimony to wife from $125 to $225 weekly, and of award of support for daughter from $45 to $75 weekly was not error in light of husband's markedly altered financial circumstances and substantial change in age, health, station and needs of both wife and daughter.

8. Divorce ⇐245(3), 309.6

Trial court's conclusion that it had taken into account all statutory criteria relevant to modifying award of alimony or child support is sufficient without distinct, special findings about each of such criteria. C.G.S.A. §§ 46–52, 46–57 (Repealed).

9. Divorce ⇐309.2(1)

Right of custodial parent to make educational choices is insufficient basis, absent showing of special need or some other compelling justification, for increasing support obligation of noncustodial parent who genuinely doubts value of program that he is being asked to underwrite.

10. Divorce ⇐309.4

Modification of support award for son to require ex-husband to pay son's expenses at private secondary school was abuse of discretion especially since ex-husband believed that son's enrollment at such school was unnecessary and undesirable.

Thomas F. McDermott, Jr., Litchfield, with whom, on the brief, was Emmet P. Nichols, Waterbury, for appellant (defendant).

Robert D. Houston, Huntington, with whom, on the brief, were Ralph C. Crozier, Bridgeport, and Arnold M. Potash, Seymour, for appellee (plaintiff).

Before BOGDANSKI, PETERS, ARTHUR H. HEALEY, ARMENTANO and WRIGHT, JJ.

PETERS, Associate Justice.

This is an appeal from the modification of orders of alimony and support. The principal issue is the propriety of an order increasing support to cover expenses arising out of the private secondary schooling of the parties' son.

The marriage between the plaintiff Cathleen Hardisty and the defendant Garwin D. Hardisty was dissolved, on April 3, 1974, at the initiative of the plaintiff upon a finding of irretrievable breakdown. The state referee to whom the matter had been referred, *Hon. John R. Thim*, sitting as the trial court, at that time entered certain orders pursuant to the agreement of the parties. Those orders awarded custody of the parties' two minor children to the plaintiff, and required the defendant to pay lump sum alimony of $20,000, periodic alimony of $125 weekly and support of $45 weekly for each child.

The plaintiff filed, on July 12, 1977, a motion to modify support and alimony, alleging substantial and material changes in circumstances, in particular the son Andrew's admission to the Kent School, a private secondary school for boys, for the following fall. The defendant countered with a motion to modify custody, which ultimately was denied; no appeal has been taken from that denial. The defendant also contested the motion for modification of alimony and support which had, in the meantime, been amended to allege, as an additional ground for modification, a substantial and material change in the defendant's financial circumstances.

After a full hearing at which the parties presented their evidence, and after a conference with the minor children, the court, *Bieluch, J.*, modified the outstanding orders of alimony and support to: increase alimony from $125 to $225 weekly; increase support for the daughter Laura from $45 to $75 weekly; and increase support for the son Andrew from $45 to $150 weekly. In addition, the defendant was ordered to pay a lump sum of $3000 retroactive support for Andrew, representing half of his Kent School expenses for the previous year. This appeal by the defendant ensued.

The defendant has raised seven claims of error. The first two attack the accuracy of the trial court's finding of facts, while the third attacks the court's conclusions as unsupported by the findings. The fourth claim contests two evidentiary rulings. The fifth, sixth and seventh claims all contest the propriety of the trial court's conclusions that a sufficient change of circumstances had been shown to warrant modification of the support and alimony orders.

I

The defendant's extensive attack on the trial court's finding of facts proves, on examination, to be, with one exception, groundless. We correct the finding to incorporate the undisputed fact that neither the defendant nor any member of his family had received primary or secondary level education at any private school. The other facts in the defendant's draft findings which the trial court refused to find were either incorporated in other findings which the court did make, or were not undisputed. The finding is thus not otherwise subject to material correction. *Jennings v. Reale Construction Co.*, 175 Conn. 16, 17–18, 392 A.2d 962 (1978); *E & F Realty Co. v. Commissioner of Transportation*, 173 Conn. 247, 249, 377 A.2d 302 (1977). The defendant's challenge to the facts as found is equally unpersuasive. In each case, there was evidence before the trial court which, if believed, would have provided an adequate basis for the finding actually made. That is

all that is required. *Fricke v. Fricke*, 174 Conn. 602, 603, 392 A.2d 473 (1978); *El Idrissi v. El Idrissi*, 173 Conn. 295, 298, 377 A.2d 330 (1977).

The defendant has also assigned error to the trial court's conclusions of fact, as distinguished from its findings of fact, with regard to material and substantial changes of the circumstances of the parties and of their children. These claims will be considered below in connection with the defendant's substantive challenges to the trial court's conclusions.

[1, 2] The defendant's evidentiary claims ask us to find error in the exclusion of the answers to two questions posed to the defendant by his own counsel. The first question arose as follows: The defendant's earnings were found to have come in part from his ownership and operation of a restaurant known as the Curtis House. The defendant was asked what the value of this restaurant would be if the lease on the property were no longer in effect. The plaintiff objected that this inquiry was speculative; the plaintiff's objection was sustained and the defendant properly excepted to this ruling. The second question arose out of an inquiry into the defendant's ability to pay for his son's secondary education at a private school. The defendant was asked whether he might be unable to pay for a college education for his son in the event that he were required to spend money for a secondary school such as Kent. Again, the plaintiff objected that the question involved speculation and, upon the trial court's ruling that the answer be excluded, the defendant properly excepted. Both of these rulings by the trial court fall within its broad discretionary power to determine the relevancy or remoteness of evidence. *Katsetos v. Nolan*, 170 Conn. 637, 649–50, 368 A.2d 172 (1976); *Doran v. Wolk*, 170 Conn. 226, 232, 365 A.2d 1190 (1976). There was no error in these evidentiary rulings.

II

The major thrust of the defendant's appeal is that the trial court erred in concluding that the plaintiff had demonstrated a substantial and unforeseen change in the circumstances existing at the time of the original decree dissolving the marriage between the parties, and that the court abused its discretion in modifying the orders of alimony and support.

The facts found by the trial court that pertain to the modification establish that there was a substantial change in the financial circumstances of the defendant between 1974 and 1978. His gross income in 1978 was two and one-half to three times what it had been previously, and his assets, including the two restaurants he owned, were five times as valuable. Although his 1978 financial affidavit listed considerable indebtedness, most of these debts were interfamily obligations. The 1978 affidavit overstated his expenses, since it did not reveal that a mortgage loan represented a joint indebtedness with his present wife and did not disclose that some of his listed expenses were paid by his wife. The defendant's salary and benefits were received from the corporations which he owned; he himself set these amounts, and was deterred by federal tax regulations from setting a higher salary. The 1978 affidavit did not disclose that the defendant had the free use of a car for which the defendant's corporation paid gasoline, upkeep and insurance. By contrast, the 1974 financial affidavit of the defendant failed to disclose the ownership of any restaurants, and reported markedly lower income and assets.

[3, 4] There was thus no error in the trial court's conclusion that there had been a sufficient change of circumstances so that the court could properly entertain a motion for modification of alimony and support. Under our statutes and cases, modification may be premised "upon a showing of substantial change in the circumstances of *either* party [to the original decree.]" (Emphasis added.) General Statutes § 46–54 (now § 46b–86);[1] *Grinold v. Grinold*, 172

1. "[General Statutes] Sec. 46b–86. (Formerly Sec. 46–54). MODIFICATION OF ALIMONY OR SUPPORT ORDERS AND JUDGMENTS. (a) Unless and to the extent that the decree

Conn. 192, 195, 374 A.2d 172 (1976); *Viglione v. Viglione*, 171 Conn. 213, 215, 368 A.2d 202 (1976); see Clark, Domestic Relations § 14.9.

[5, 6] Once a trial court determines that there has been a substantial change in the financial circumstances of one of the parties, the same criteria that determine an initial award of alimony and support are relevant to the question of modification. *Sanchione v. Sanchione*, 173 Conn. 397, 401–402, 378 A.2d 522 (1977); see Clark, Domestic Relations § 14.9, pp. 456–57. These require the court to consider, without limitation, the needs and financial resources of each of the parties and their children, as well as such factors as health, age and station in life. General Statutes, § 46–52 (now § 46b–82), and § 46–57 (now § 46b–84),[2] *Cummock v. Cummock*, 180 Conn 218, 221, 429 A.2d 474 (1980), *Jacobsen v. Jacobsen*, 177 Conn. 259, 264, 413 A.2d 854 (1979). In making its determination of the applicability of these criteria, the trial court has broad discretion, "[t]he test is whether the court could reasonably conclude as it did" *Koizim v. Koizim*, 181 Conn. 492, 497, 435 A.2d 1030 (1980); *Noce v. Noce*, 181 Conn. 145, 150, 434 A.2d 345 (1980); *Aguire v. Aguire*, 171 Conn. 312, 314, 370 A.2d 948 (1976)

Our review is limited to deciding whether the trial court has abused its legal discretion. As we have repeatedly noted, "trial courts have a distinct advantage over an

precludes modification, any final order for the periodic payment of permanent alimony or support or alimony or support pendente lite may at any time thereafter be continued, set aside, altered or modified by said court upon a showing of a substantial change in the circumstances of either party This section shall not apply to assignments under section 46b-81 or to any assignment of the estate or a portion thereof of one party to the other party under prior law

"(b) In an action for divorce, dissolution of marriage, legal separation or annulment brought by a husband or wife, in which a final judgment has been entered providing for the payment of periodic alimony by one party to the other, the superior court may, in its discretion and upon notice and hearing, modify such judgment and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party"

2. "[General Statutes] Sec 46b–82. (Formerly Sec. 46–52). ALIMONY. At the time of entering the decree, the superior court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b–81. The order may direct that security be given therefor on such terms as the court may deem desirable In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall hear the witnesses, if any, of each party, except as provided in subsection (a) of section 46b–51, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award if any, which the court may make pursuant to section 46b–81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability of such parent's securing employment"

"[General Statutes] Sec 46b–84 (Formerly Sec 46–57) PARENTS' OBLIGATION FOR MAINTENANCE OF MINOR CHILD (a) Upon or subsequent to the annulment or dissolution of any marriage or the entry of a decree of legal separation or divorce, the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance

"(b) In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child

"(c) After the granting of a decree annulling or dissolving the marriage or ordering a legal separation, and upon complaint or motion with order and summons made to the superior court by either parent or by the commissioner of administrative services in any case arising under subsection (a) of this section, the court shall inquire into the child's need of maintenance and the respective abilities of the parents to supply maintenance The court shall make and enforce the decree for the maintenance of the child as it considers just, and may direct security to be given therefor"

appellate court in dealing with domestic relations where all of the surrounding circumstances and the appearance and attitude of the parties are so significant' *Jacobsen* v *Jacobsen*, supra, 177 Conn 262 413 A 2d 854 *Koizim* v *Koizim* supra 181 Conn at 498 435 A 2d 1030 *Fucci* v *Fucci* 179 Conn 174, 181 425 A 2d 592 (1979) *Grinold* v *Grinold*, supra, 172 Conn 194, 374 A 2d 172

[7, 8] Applying this test to the present appeal, we find no error in the trial court's modification of the award of alimony from $125 to $225 weekly, and the award of support for the daughter Laura from $45 to $75 weekly In light of the defendant's markedly altered financial circumstances, and the facts concerning the needs of the plaintiff and of Laura found by the court and disclosed by the plaintiff's financial affidavit, granting these relatively modest modifications cannot be characterized as an abuse of discretion The court expressly concluded that there was a substantial change in the circumstances of the plaintiff and of Laura, with respect, inter alia, to their age, health, station and needs A trial court's conclusion that it has taken into account all of the statutory criteria[3] relevant to an award of alimony or support is sufficient without distinct, special findings about each of these criteria *Posada* v *Posada*, 179 Conn 568, 573, 427 A 2d 406 (1980), *Fucci* v *Fucci*, supra, 179 Conn at 181, 425 A 2d 592

The trial court also modified the order of support for the parties' son Andrew, increasing that award from $45 to $150 a week That modification included expenses of $125 a week to enable Andrew to attend a private boarding school for boys, the Kent School The trial court expressly found that the plaintiff had enrolled Andrew in the Kent School without consulting the defendant and that the plaintiff needs financial assistance from the defendant for Andrew's continued enrollment at the Kent School The court found that Andrew is extremely intelligent and wants to continue at the Kent School The court also found that the defendant is able to pay for his son's education at the Kent School but refuses to do so because he believes a private school at the secondary level is unnecessary and undesirable No one in the defendant's family has ever received private primary or secondary education In reviewing whether these findings suffice to establish a reasonable basis for an order to pay the increased order of support, we note further, that although the trial court repeatedly expressed its skepticism about the accuracy of the defendant's financial disclosures,[4] the court expressed no such doubts about the good faith of the defendant's objection to private secondary schooling

This court has only once had the opportunity to consider whether a parent may be compelled to provide private school education for his child In *Cleveland* v *Cleveland*, 161 Conn 452, 461, 289 A 2d 909 (1971), we held that "courts have the power to direct one or both parents to pay for private schooling, if the circumstances warrant It is a matter to be determined in the sound discretion of the court on consideration of the totality of the circumstances including the financial ability of the parties the availability of public schools, the schools attended by the children prior to the divorce and the special needs and general welfare of the children Notes, 133 A L R 902, 909, 56 A L R 2d 1207, 1215" When that case returned to this court after action by the trial court upon remand, we recognized, however that a noncustodial parent might reasonably and in good faith differ with a custodial parent as to what school would be most appropriate for a child at any particular time *Cleveland* v *Cleveland*, 165 Conn 95, 98 99, 328 A 2d 691 (1973) When such a good faith dispute arose, we upheld the modification of a decree which had ordered the noncustodial father to pay boarding school or college

3. See General Statutes § 46–52 (now § 46b 82), and § 46–57 (now § 46b–84)

4 The court stated during the proceedings I will say for the record that this [the defendant's financial] affidavit was misleading to the Court

expenses on the condition that he be consulted about the choice of the relevant educational institution The effect of the modification was to substitute a lump sum support obligation, in a lesser amount, for the prior obligation to pay all educational expenses

Like *Cleveland v Cleveland*, the cases in other jurisdictions reflect the tension between the right of the custodial parent to make educational decisions in the best interests of the child and the right of the noncustodial parent, if asked to pay the bill, to take, in good faith, a different view of educational choices We have found no case, nor has any been cited to us, in which a parent has been compelled to pay the total cost of private schooling to which he objects because of a principled preference for public primary and secondary schooling Many of the cases denying such an obligation are distinguishable because the requisite financial ability to pay for such schooling was not established See, e g , *Forman v Forman*, 127 N Y S 2d 17 (Dom Rel Ct 1954), *Holt v Holt*, 330 So 2d 489 (Fla App 1976), *Degener v Degener*, 478 S W 2d 687 (Mo App 1972) Many of the cases affirming such an obligation are distinguishable because they, like *Cleveland v Cleveland*, involve interpretation of a prior agreement or divorce decree authorizing private schooling See, e g , *Savell v Savell*, 213 Miss 869, 58 So 2d 41 (1952), *Bize v Bize*, 154 Neb 520, 48 N W 2d 649 (1951), *Kern v Kern*, 65 Misc 2d 765, 319 N Y S 2d 178 (1970) Cf *Van Nortwick v Van Nortwick*, 87 Ill App 2d 55, 230 N E 2d 391 (1967) Although some courts have indicated, in dictum, that tuition at a private school was not an expense which a court could order a noncustodial parent to pay, *Winston v Winston*, 50 App Div 2d 527, 375 N Y S 2d 5 (1975), *Ziesel v Ziesel*, 93 N J Eq 153, 157, 115 A 435 (1921), in these cases there were also financial impediments to such an order of support Those courts that have ordered private school expenses to be paid were not confronted with principled objection to such schooling in *Cappel v Cappel*, 243 Iowa 1363, 1367, 55 N W 2d 481 (1952), there was, furthermore, some showing of special need, and in *Williams v Barnette*, 226 La 635, 639, 76 So 2d 912 (1954), the parent ordered to pay school expenses did not appeal that order

The case before us appears therefore to be a case of first impression, not only here but elsewhere in this country [5] The record before us is thus especially significant as we explore these uncharted waters That record shows a gifted child, eager to go to a private secondary school, and a noncustodial parent with sufficient financial means to pay for such education What the record does not show is, however, equally revealing There is no showing of this child's special educational or psychological need for private schooling or of the inadequacy, in general or for this child, of the local public schools There is no showing that, but for this divorce, this child would probably have attended a private school, in fact, the defendant's family history indicates the opposite There is no showing that the defendant ever agreed to private schooling for his son To the contrary, the trial court has found, as a fact, that the defendant believes that his son's enrollment at the Kent School is unnecessary and undesirable

[9, 10] We have come to accept the unfortunate reality that marital relationships sometimes break down irretrievably without fault due to the emergence of irreconcilable differences between the marital partners *Joy v Joy*, 178 Conn 254, 256, 423 A 2d 895 (1979) The same irreconcilable differences that led to the breakdown of

5. It is important to recognize that this case involves private secondary schooling rather than college expenses The issues raised in the college cases on which we express no opinion are different in two respects from the case before us Because college bound children are normally over the age of 18 college expense cases pose an issue of support past the age of minority which is not involved in the case before us In the college expense cases furthermore there may be as Professor Clark suggests a more cogent argument that such expenses have become necessaries Clark Domestic Relations § 15 1 pp 497-98 see annot 99 A L R 3d 322 (1980)

the marriage often spill over into significantly divergent views about child rearing. *Seymour v. Seymour*, 180 Conn. 705, 709, 433 A.2d 1005 (1980). In order to minimize the disruptive impact of such conflicts upon the children of the marriage, custody may be awarded to one parent alone; *Seymour v. Seymour*, supra; or a monetary award substituted for divisive joint decision-making. *Cleveland v. Cleveland*, supra, 165 Conn. 101, 328 A.2d 691. The right of the custodial parent to make educational choices is, however, an insufficient basis, absent a showing of special need or some other compelling justification, for increasing the support obligation of the noncustodial parent who genuinely doubts the value of the program that he is being asked to underwrite. In the light of the totality of the circumstances in this case, we conclude therefore that the trial court abused its discretion in modifying the support award for Andrew Hardisty to require the defendant to pay Andrew's expenses at the Kent School. For the same reason, the award of $3000 retroactive support for Andrew was also in error.

It may be that the support order for Andrew should have been modified with regard to expenses other than those relating to his attendance at the Kent School. The original award for Andrew was modified in an amount less than the Kent School tuition. A remand is required to make a proper determination of what the defendant's obligation to support Andrew should be.

There is error and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other Judges concurred.

BEAD CHAIN MANUFACTURING COMPANY
v.
SAXTON PRODUCTS, INC.

Supreme Court of Connecticut.

Argued Jan. 9, 1981.

Decided March 3, 1981.

Action was brought for breach of a contract for purchase of specially manufactured electronic parts. The Superior Court, Fairfield County, Saden, J., entered judgment for seller on complaint and on buyer's counterclaim, and appeal was taken. The Supreme Court, Peters, J., held that: (1) buyer's protracted delay in rejecting electronic parts tendered by seller, coupled with its delay in notifying seller of the alleged nonconformity, obligated buyer to accept delivery; (2) provision of purchase order which required buyer to pay seller $3,475 for fitting-up charges for tooling and giving buyer exclusive use without limitation of parts as shown in Sketch S–1318 did not entitle buyer to ownership of tools manufactured by seller to produce the parts; and (3) buyer's conduct in refusing to accept parts shipped to it in 1974 and in refusing to pay tooling charges constituted a breach of contract.

No error.

1. Sales ⇐178(3)

Even though purchase order made time of the essence, buyer was obligated to accept late delivery of electronic parts from seller, in that there was a protracted delay in rejection of parts tendered by seller, and there was delay in notification to seller of alleged nonconformity of parts, which was readily apparent at time of tender. C.G.S.A. §§ 42a–2–513(1), 42a–2–602(1), 42a–2–606(1)(b).

2. Sales ⇐3

Provision of purchase order which required buyer to pay seller $3,475 as fitting-up charges for tooling and gave buyer "ex-

EXHIBIT C

mined in this case. The defense hoped to show that because Tracy had not contracted the herpes virus, it was unlikely that sexual contact between her and defendant had occurred.

"As a general rule the resolution of questions of evidentiary relevance, materiality and admissibility rests in the sound discretion of the trial justice; his ruling will not constitute reversible error unless it is a prejudicial abuse of discretion." *State v. Gelinas*, 417 A.2d 1381, 1386 (R.I.1980). The trial justice must first determine whether the evidence being offered falls within the definition of relevant evidence provided by the Rhode Island Rules of Evidence. Even when the evidence is relevant, it is not automatically admissible. The trial court must assess whether the offered evidence, though relevant, is unfairly prejudicial to the opposing party or would mislead or confuse the jury. R.I.R.Evid. 403.

The evidence that defense counsel sought to introduce was that the defendant had been diagnosed as having herpes simplex 1 and 2 prior to the alleged sexual assault. The medical experts could not testify about whether defendant was experiencing a period during which the virus would have been transmittable at the time of the assault. They also could not testify to whether a single contact would have passed the virus to the victim. The relevance of such testimony was tenuous at best. It would have been of little help to the jury in deciding the issues in the case, could easily have misled or confused the jury, and was properly excluded by the trial justice under Rule 403 of our rules of evidence.

For these reasons the defendant's appeal is denied and dismissed, the judgment of conviction appealed from is affirmed, and the papers of the case are remanded to the Superior Court.

Roger L. PONTBRIAND

v.

Virginia May PONTBRIAND.

No. 91-517-M.P.

Supreme Court of Rhode Island.

March 29, 1993.

Wife filed motion to have husband held in contempt for unilaterally reducing child support payments provided for by divorcee decree. The Family Court, O'Brien, Master, modified support, adjudged husband to be in contempt, and husband petitioned for certiorari. The Supreme Court, Shea, J., held that: (1) child-support obligation of noncustodial spouse may be offset by Social Security benefits paid to children on behalf of that parent, and (2) husband did not demonstrate any willful disregard for court's order in reducing payments to account for the Social Security benefits.

Appeal sustained, judgment vacated, petition for certiorari granted, order modifying support quashed, and case remanded.

1. Parent and Child ⇐3.3(9)

Child-support obligation of a noncustodial spouse may be offset by Social Security benefits made to dependent children on behalf of that parent.

2. Divorce ⇐311(2)

The reduction in the husband's disability pension to reflect Social Security benefits paid to husband and his children should have been considered by trial court in proceeding on motion by wife to adjudge husband in contempt for unilaterally reducing child support payments based upon what children received from Social Security on his behalf; to ignore the reduction in pension would be inequitable.

3. Divorce ⇐309.2(2)

Payment of Social Security benefits to children on husband's behalf could be considered change in circumstances warrant-

ng modification of husband's child support obligation under divorce decree.

4. **Divorce** ⇐308

Husband was not required to seek modification of divorce decree before reducing child support payments when Social Security benefits were made available to dependent children; instead of seeking formal modification from Family Court, husband would be required to inform Family Court that source of income had changed and that credit would be taken.

5. **Divorce** ⇐309.2(3)

Trial court's modification of child support order, under which husband was granted no credit for Social Security benefits paid to children, with result that amount of support payments together with Social Security benefits increased funds available for support of children without showing of additional need, was clearly wrong.

6. **Contempt** ⇐20

Party who disregards valid court order in favor of his own notion of justice should be adjudged in contempt.

7. **Parent and Child** ⇐3.3(9)

In contempt proceedings involving child support obligation, respondent can raise question of his lack of willfulness and his inability to pay.

8. **Contempt** ⇐61(2)

Whether party is willful in his disobedience of court order is question of fact.

9. **Contempt** ⇐66(7)

In reviewing judgment of contempt, decision of trial court is given great deference and will not be disturbed absent clear abuse.

10. **Divorce** ⇐311(2)

Finding of contempt against former husband who reduced child support payments, on advice of counsel, to account for Social Security benefits paid for benefit of children, was error; husband did not demonstrate any willful disregard for court's

Brenda Coville Harrigan, Gunning, LaFazia & Gnys, Providence, for plaintiff.

David Strachman, Lipsey & Skolnik, Providence, for defendant.

OPINION

SHEA, Justice.

The plaintiff, Roger L. Pontbriand (Roger), and the defendant, Virginia May Pontbriand (Virginia), were divorced by final decree on November 16, 1990. The plaintiff has petitioned this court for the issuance of a writ of certiorari to review the trial master's failure to give the plaintiff a dollar-for-dollar credit against his child-support obligation for payments received by his children from Social Security through their representative and the trial master's failure to consider the children's receipt of dependency benefits from Social Security in the calculation of the husband's child-support obligation. The plaintiff also appeals from the trial master's adjudging him in willful contempt. We quash the judgment regarding the change in the child support, and we sustain the appeal from the finding of contempt.

Pursuant to a final divorce decree Roger was required to pay Virginia the sum of $575 per month as child support. This figure derived from the child-support-guideline worksheet, was based upon Roger's monthly gross income of $2,000. At the time of the divorce his monthly gross income consisted of medical benefits that he received from the Teachers Insurance and Annuity Association College Retirement Equities Fund (TIAA/CREF) as a result of his disability retirement from the Rhode Island School of Design in March 1990. Roger's monthly income was determined by calculating 60 percent of his wage base versus the total sum of benefits received from other sources. Under the TIAA/CREF plan benefits from other sources include moneys paid to either plaintiff himself or to his codependents. Thus Roger's monthly benefits from TIAA/CREF would be reduced by the amount of any monthly Social Security benefits that

Commencing December 1990, Roger and his dependents were entitled to receive Social Security benefits. The monthly total was $1,488.40. Of that total amount $992.30 was payable directly to plaintiff, and $496.10 was payable directly to defendant as the children's representative. On November 23, 1990, TIAA/CREF notified plaintiff that since he was receiving Social Security benefits, his monthly TIAA/CREF payments would be reduced by the total amount that he and his dependents were receiving in Social Security benefits ($1,488.40). The plaintiff's monthly benefit from TIAA/CREF was recalculated at $745.46 per month.

Roger, without leave of court, began making child-support payments of only $79 per month ($575 minus the $496 that his children were receiving directly from Social Security). Under this formulation the children would still receive the required $575 but now from two sources. In addition he filed a motion to modify the child-support order on December 13, 1990, to reflect the change in the source of his total income. On January 4, 1991, Virginia filed a motion to adjudge Roger in contempt for paying only $79 rather than the $575 ordered.

At the subsequent hearing on June 3, 1991, the trial master ruled that Roger erred in making a dollar-for-dollar reduction of his child-support payments based upon what his children received from Social Security on his behalf. Since Roger unilaterally reduced his support payments, the master found him in contempt of the divorce decree. The trial master did consider his motion to modify support based on his reduction in income and reduced his support obligation to $454 per month.

The benefits received by the children were not considered in this modification. As a result of the deduction in Roger's gross income, a new child-support calculation was made. Consequently Roger's individual child-support obligation was reduced to $454 per month. Under this modification the dependent children would now receive both the $454 per month from Roger and the $496–per–month benefit from Social Security, for a total of $950 per month. Thus the children would be allowed $375 more per month than the original support order of $575 per month without any showing of increased need.

Roger asserted first that he should be allowed a direct credit of $496 per month toward his child-support obligation for the money that the children receive from Social Security on his behalf. Under this reasoning, he argues, he should only be required to pay $79 per month for the difference between the child-support order and the Social Security benefit. In the alternative he requested that the support order be modified to reflect his decrease in gross income *and* the increase in funds available to the children from Social Security. The modification he seeks would require him under a new order to pay only the $79.

I

[1] We first address plaintiff's request for a direct credit. The allowance of a credit for Social Security payments has not been raised previously in Rhode Island. We shall therefore look to the experience of the states that have considered the question.[1]

The overwhelming majority of states that have considered this issue allow a credit for Social Security benefits paid to dependent children. *Windham v. State*, 574 So.2d 853 (Ala.Civ.App.1990) (citing *Binns v. Maddox*, 57 Ala.App. 230, 327 So.2d 726 (1976)); *Cash v. Cash*, 234 Ark. 603, 353 S.W.2d 348 (1962); *Lopez v. Lopez*, 125 Ariz. 309, 609 P.2d 579 (Ct.App. 1980); *In re Marriage of Denny*, 115 Cal. App.3d 543, 171 Cal.Rptr. 440 (1981); *Perteet v. Sumner*, 246 Ga. 182, 269 S.E.2d 453 (1980) (citing *Horton v. Horton*, 219 Ga. 177, 132 S.E.2d 200 (1963)); *Newman v. Newman*, 451 N.W.2d 843 (Iowa 1990) (citing *Potts v. Potts*, 240 N.W.2d 680 (Iowa 1976)); *Childerson v. Hess*, 198 Ill. App.3d 395, 144 Ill.Dec. 551, 555 N.E.2d 1070 (1990); *Poynter v. Poynter*, 590

1. *See also* Annot., *Right to Credit on Child Support Payments for Social Security or Other Government Dependency Payments Made for Benefit of Child*, 77 A.L.R.3d 1315 (1977 & 1992 Supp.).

N.E.2d 150 (Ind.Ct.App.1992); *Andler v. Andler*, 217 Kan. 538, 538 P.2d 649 (1975); *McCloud v. McCloud*, 544 So.2d 764 (La.Ct. App.1989) (citing *Folds v. Lebert*, 420 So.2d 715 (La.Ct.App.1982)); *Frens v. Frens*, 191 Mich.App. 654, 478 N.W.2d 750 (1991); *Mooneyham v. Mooneyham*, 420 So.2d 1072 (Miss.1982); *Weaks v. Weaks*, 821 S.W.2d 503 (Mo.1991); *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990) (citing *Schulze v. Jensen*, 191 Neb. 253, 214 N.W.2d 591 (1974)); *Griffin v. Avery*, 120 N.H. 783, 424 A.2d 175 (1980); *Romero v. Romero*, 101 N.M. 345, 682 P.2d 201 (Ct. App.1984); *Guthmiller v. Guthmiller*, 448 N.W.2d 643 (N.D.1989); *Davis v. Davis*, 141 Vt. 398, 449 A.2d 947 (1982).

In addition several states have extended this same principle to Social Security benefits paid to children as survivor's benefits. *Bowden v. Bowden*, 426 So.2d 448 (Ala.Civ. App.1983) (applying North Carolina law); *In re Marriage of Meek*, 669 P.2d 628 (Colo.Ct.App.1983); *Board v. Board*, 690 S.W.2d 380 (Ky.1985); *Cohen v. Murphy*, 368 Mass. 144, 330 N.E.2d 473 (1975). In these states, direct credit is given to the decedent's estate for death benefits payable to the surviving children.

We shall adopt the rationale of the majority of the states and allow the child-support obligations of a noncustodial spouse to be offset by the Social Security benefits paid to dependent children on behalf of that parent. The rationale for allowing a credit is perhaps best stated by a recent Indiana decision on the issue. "The rationale is that the social security benefits are not gratuities but are earned, and they substitute for lost earning power because of the disability." *Poynter v. Poynter*, 590 N.E.2d at 152. Similarly the Vermont court recognized that equitable considerations require that a credit be given when it stated that:

> "[E]quity and fairness demand that consideration be given to government child support benefits paid to the party having custody. These payments are, in a sense, a substitute for wages the obligor would have received but for the disability, and from which the court ordered payments would otherwise have been made. * * * In theory, at least, the actual *source* of payments is of no concern to the party having custody as long as they are in fact made." *Davis v. Davis*, 141 Vt. at 401, 449 A.2d at 948.

The Missouri court rejected its previous determination in *Craver v. Craver*, 649 S.W.2d 440 (Mo.1983), which disallowed the credit, in favor of the majority view. *Weaks v. Weaks*, 821 S.W.2d 503 (Mo.1991). In reviewing the proper focus of the inquiry, the *Weaks* court explained that "the key fact is that the benefits paid to the children are derived from funds 'earned' by the contributer." *Id.* at 506. "The focus of the inquiry should be whether the purpose of child support is satisfied by the receipt of the social security benefits." *Id.* (citing *Horton v. Horton*, 219 Ga. 177, 132 S.E.2d at 201; *Potts v. Potts*, 240 N.W.2d at 681). Since Social Security benefits are specifically provided to replace lost income, it would be "inequitable to withhold a credit against the child support obligation." *Weaks*, 821 S.W.2d at 506.

The Missouri court in *Weaks* went even further and pronounced that the minority rule requiring the petitioner to seek a modification in order to get a credit "is harsh and unjust." *Id.*

> "In situations involving disability benefits, the party seeking credit most likely faces a reduction of income, financial uncertainty, physical or mental impairment and other attendant consequences of the disability. The additional burden of petitioning the court for a modification typically wastes time and money and helps no one." *Id.* at 506–07.

Direct credit should be given to the noncustodial spouse, when the receipt of Social Security benefits is "merely a change in the identity of the payer." *Id.* at 507 (citing *Board v. Board*, 690 S.W.2d at 381).

[2] In the present case the Pontbriand children were entitled to receive benefits from Social Security because of the earned contributions made by the father. The benefits received were paid because of their father's disability. His pension was reduced to account for this additional in-

come from Social Security and intended to substitute for a portion of his pension income. To ignore the fact that Roger's income from TIAA/CREF was reduced to reflect dependency benefits paid to him and his children would be inequitable. Roger's income base did not change, but rather the source. Following the line of cases recognizing that the Social Security benefits paid to the children are a substitute for earned income, we must give Roger credit toward his child0-support obligation for the Social Security benefits paid.

[3, 4] In a minority of states the allowance of a credit has been limited by requiring the petitioner to seek a modification from the court. The Social Security benefit to the children may be considered a change in circumstance that warrants a modification. *In re Estate of Patterson*, 167 Ariz. 168, 805 P.2d 401 (1991); *Arnoldt v. Arnoldt*, 147 Misc.2d 37, 554 N.Y.S.2d 396 (1990); *Children Youth & Services v. Chorgo*, 341 Pa.Super. 512, 491 A.2d 1374 (1985); *Chase v. Chase*, 74 Wash.2d 253, 444 P.2d 145 (1968); *Farley v. Farley*, 186 W.Va. 263, 412 S.E.2d 261 (1991); *Hinckley v. Hinckley*, 812 P.2d 907 (Wyo.1991). We decline to follow the states that require a petitioner to seek a modification for a reduction in child-support payments when Social Security benefits are available to the dependent children. Instead of seeking a formal modification from the Family Court that considers the Social Security benefit, we require a noncustodial parent to inform the Family Court, that the source of income has changed and that a credit will be taken. "There is a distinction between crediting an obligation with payment made from another source and increasing, decreasing or terminating, or otherwise modifying a specific dollar amount." *Board v. Board*, 690 S.W.2d at 381. A child-support obligor may reduce or suspend payments for support of the children only after petitioning the Family Court. *Grissom v. Pawtucket Trust Co.*, 559 A.2d 1065 (R.I.1989).

In this case Roger is not seeking a reduction or suspension of the payments but rather a credit for the change in source of payments. No modification is necessary. The Family Court and custodial spouse need only be notified that the support order is being met through different sources.

II

[5] In light of this finding plaintiff's alternative argument that the trial justice erred in failing to consider the additional income that the children were receiving through Social Security is no longer the focus of our inquiry. We have held repeatedly that an order modifying a child-support decree will not be disturbed unless that order is based on findings that are clearly wrong. *Meehan v. Meehan*, 603 A.2d 333 (R.I.1992). Our conclusion that a direct credit should have been granted warrants a finding here that the trial master's modification of the support order, considering only Roger's decreased income without any showing of additional need for the children, was clearly wrong.

III

[6–8] We now move to the issue of contempt. A party who disregards a valid court order in favor of his own notion of justice should be adjudged in contempt. "A contempt order * * * relates to the power of the Family Court to vindicate the authority of its decrees by coercing a respondent into obedience thereto." *Lippman v. Kay*, 415 A.2d 738, 742 (R.I. 1980). In these contempt proceedings a respondent can raise the question of his lack of willfulness and his inability to pay. *Id.* (citing *Brown v. Brown*, 114 R.I. 117, 120, 329 A.2d 200, 201 (1974)). Whether a party is willful in his disobedience is a question of fact. *Borozny v. Paine*, 122 R.I. 701, 707, 411 A.2d 304, 307 (1980).

[9, 10] In reviewing an adjudgment of contempt, the decision of the trial justice is given great deference and will not be disturbed absent a clear abuse. *Williams v. Williams*, 429 A.2d 450, 454 (R.I.1981). In this case we conclude that the trial master erred in finding contempt. By reducing his payments to $79, on advice of counsel, to account for the difference between the So-

cial Security benefits and the support order, Roger did not demonstrate any willful disregard for the court's order. In fact it appears that he went out of his way to ensure that the exact dollar amount to which his children were entitled was met.

For these reasons the plaintiff's appeal from the contempt order is sustained, and that judgment is vacated. The petition for certiorari is granted, and the order modifying the child support is quashed. The papers of the case are remanded to the Family Court with our decision endorsed thereon.

Harold J. HARRIS et al.

v.

Alexander TURCHETTA d.b.a. Camille's Coffee Shop, Inc. et al.

No. 91-566-Appeal.

Supreme Court of Rhode Island.

March 31, 1993.

Landlord sued seeking possession of certain premises as well as judgment for back rent. The district court entered judgment by stipulation of parties against tenants in amount of $5,464 plus interest from back rent and also for possession of premises. Tenants appealed. After case was referred to arbitration and award was entered for landlords, tenants rejected award and sought trial de novo in Superior Court. The Superior Court, Providence County, Rodgers, J., entered judgment for landlords in amount of $5,464 with interest and costs. Tenants appealed. The Supreme Court, Weisberger, J., held that: (1) business was not de facto corporation after revocation of its charter by Secretary of State, and thus, owners were personally liable for back rent; (2) ledger card in conjunction with manager's testimony established arrearages in sum of $5,464 and it was unnecessary for trial justice to take judicial notice of stipulation for judgment that had been entered in district court in that amount; (3) any error by trial justice taking judicial notice of judgment stipulation was harmless in light of other evidence; and (4) wife was sufficiently involved in business so that she was principal and was personally liable for corporate debts after corporation ceased to exist.

Appeals dismissed; judgment affirmed.

1. Corporations ⇐349, 617(1)

Company was not de facto corporation after revocation by Secretary of State of its articles of association due to its failure to file reports, and thus, principal officers of company who continued to do business under corporate name after charter had been revoked were personally liable for rent assessed against company by landlord.

2. Corporations ⇐613(2)

Statement of company's owner that he had not received notice from Secretary of State as to revocation of company's articles of association due to failure to file reports was insufficient to overcome presumption that mail regularly sent from office of Secretary of State was received at corporate offices listed on prior reports.

3. Corporations ⇐391, 392

Those who seek to insulate themselves from liability by using corporate form of business enterprise have responsibility to see that reports are duly filed and that attorney for service of process is appointed.

4. Corporations ⇐392

If attorney appointed for service of process on corporation is deceased, corporate officers have responsibility to appoint new one so that Secretary of State's office may always have responsible party to whom to send appropriate notices.